TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 13

DOYLE SMITH, PETITIONER,

vs.

EVENING NEWS ASSOCIATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED MAY 12, 1961
CERTIORARI GRANTED MARCH 26, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 89

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INDEX

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

48675

DOYLE SMITH, Plaintiff and Appellant,

vs.

EVENING NEWS ASSOCIATION, Defendant.

Appellant's Appendix

IN THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

CALENDAR ENTRIES

1956		
Oct.	9.	Praecipe filed; summons issued.
Oct.	9.	Declaration filed.
Oct.	11.	Summons returned served; filed.
Oct.	24.	Answer filed.
Nov.	1.	Reply to defendant's answer filed.
Nov.	30.	Praecipe for causes ready for trial filed.
1957		
May	29.	Depositions filed.
Dec.	6.	Amended declaration filed.
Dec.	6.	Interrogatories to defendant filed.
1958		
Jan.	2.	Deposition Filed.
Jan.	2.	Second amended declaration filed.
Feb.	17.	Pre-trial statement signed and filed.
Mar.	6.	Stipulation adjourning case to May, 1958, filed.
May	12.	Assigned to Judge Culehan.

1960

Feb. 1. Opinion of the Court, signed and filed, Judge Culehan.

Feb. 1. Brief in support of motion to dismiss for lack of jurisdiction.

Feb. 1. Brief in opposition to motion to dismiss for lack of jurisdiction.

Feb. 1. Reply brief of defendant in support of motion to dismiss for lack of jurisdiction.

[fol. 2]

Feb. 11. Order for dismissal signed, Judge Miles N. Culehan.

Feb. 11. Proof of service filed.

Mar. 1. Notice of performance of requisite acts on appeal filed.

Mar. 1. Proof of service filed of claim of appeal, notice of performance of requisite acts on appeal.

Mar. 1. Certificate that amount in controversy exceeds the sum of $500.00 signed, filed, Miles N. Culehan.

Mar. 1. Claim of appeal filed.

IN THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

SECOND AMENDED DECLARATION—Filed January 2, 1958

Now comes the above-named plaintiff, Doyle Smith, by his attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, declaring against the Evening News Association, a Michigan corporation, defendant herein, in an action of assumpsit, says as follows:

1. That the plaintiff is and at all times mentioned herein was a resident of the City of Detroit, County of Wayne, State of Michigan.

2. That the defendant is a Michigan corporation having its principal offices and place of business in the City of Detroit, County of Wayne, State of Michigan.

3. That plaintiff is, and at all times mentioned herein was, an employee of the defendant, Evening News Association.

4. That among other employees, the following are and have been similarly employees of the defendant corporation:

[fol. 3]

Inez N. Bailey	Robert L. Beamon
Tyler H. Boykin	Floyd Brown
Alvin Bryant	Ulysses Chauffe
Vertical Clemons	Ruth Crosby
Lamar Dye, Jr.	Candis W. Edwards
Willie Ervin, Jr.	James P. Floyd
Columbus Gondeau	Sam Harris, Jr.
John T. Hunt	Eddie R. Jackson
Arthur N. Johnson	Edgar L. Jones
Jimmie V. Jones	Jefferson Knowles
Hoover Koger	Joseph M. Koger
Ernest Lawson	Phillip Madison
Jimmie L. Matthews	Charles May
Mitchell L. May	Warren Newton
Alma C. Offut	W. Parker
William Parks	Turner Powell
Reba Powell	Robert J. Pullen
John R. Reed	Laura L. Reed
William Rice	Mary Roberson
James Roberson	Anthony Sams
David E. Scott	Clifford Steele
James Tanner	James Tate
William Thomas	Clark Watkins
Howard Westbrook	Allen Williams
Troy Williams	

and the said employees have prior to the commencement of this action assigned their claims for wages due them by the defendants, which claims are hereinafter set forth, to the plaintiff for a good and valuable consideration.

5. That plaintiff and his assignees are, and at all times mentioned herein were, members of a labor organization, namely, the Newspaper Guild of Detroit.

[fol. 4] 6. That the Newspaper Guild of Detroit and defendant have entered into a collective bargaining agreement providing certain benefits to plaintiff and his assignees that the collective bargaining agreement concerned with herein was an agreement entered into between the parties January 1, 1954, continuing to December 31, 1955, the terms of which, by agreement of the parties, continued until January 27, 1956, at which time the parties entered into a collective bargaining agreement, effective January 1, 1956, to December 31, 1957; that the collective bargaining agreement entered in January, 1954, which by agreement was continued until January 27, 1956, contained among other things, a provision known as Article IV, Section 5, as follows:

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild."

7. That on December 1, 1955, and continuing until January 16, 1956, a group of employees of the defendant, belonging to a union other than that representing the plaintiff and his assignees, caused a strike to be called at the premises of the defendant, and that the defendant did not permit the plaintiff and his assignees to report on their regular shifts.

8. That plaintiff and his assignees during the period from December 1, 1955, to January 16, 1956, were ready, able and available for work on their regular shifts and positions, but were advised by the defendant that only a small portion of the employees would be allowed to enter the premises, and that as a result plaintiff and his assignees lost considerable money in wages.

9. That during the period from December 1, 1955, to January 16, 1956, defendant permitted employees of the Editorial Department, Business Office and Advertising De-
[fol. 5] partment, who are not covered by any collective bargaining agreement, to report on the premises even though there was no work available, and that defendant paid full wages to the above-mentioned employees during

the entire period, and that the wages paid to these employees was a sum in excess of $750,000.00.

10. That the defendant's refusal to pay full wages to the plaintiff and his assignees during the period from December 1, 1955, to January 16, 1956, and defendant's payment of full wages to the employees of the Editorial Department, Business Office and Advertising Department, during the period from December 1, 1955, to January 16, 1956, was in violation of the contract provision heretofore set forth.

11. That the said conduct of the defendant corporation has resulted in great financial loss and damages to the plaintiff and his assignees, in an amount which plaintiff cannot positively ascertain by reason of the fact that the books, records, papers and other documents evidencing the amount here in controversy are in the exclusive possession of the defendant corporation, and the plaintiff cannot accurately compute the amount without examination of such books, records, papers and other documents.

Wherefore, plaintiff claims damages in the amount of Twenty Thousand ($20,000.00) Dollars, together with interest, costs and attorney fees.

Rothe, Marston, Mazey, Sachs & O'Connell, By: William Mazey, Attorneys for Plaintiff, 3610 Cadillac Tower, Detroit 26, Michigan.

Dated: December 30, 1957.

[fol. 6]

IN THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

ANSWER TO SECOND AMENDED DECLARATION—
Filed October 24, 1956

Now comes the defendants, by its attorney, Butzel, Eaman, Long, Gust & Kennedy, and for answer to the Declaration herein says:

1. Defendant has no knowledge or information sufficient to form a belief with respect to the allegations in Paragraph 1 and therefore neither admits nor denies the same.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are admitted.

4. The allegations of Paragraph 4 are admitted except defendant has no knowledge or information sufficient to form a belief with respect to (i) the allegation that James Tanner, William Thomas, Troy Williams, W. J. Parker Bey, Robert J. Pullen and Clifford Steele are and have been employees of defendant, and (ii) the allegation that wages have been assigned for a valuable consideration by those named in the Declaration, and therefore neither admits nor denies such allegations.

5. Defendant has no knowledge or information sufficient to form a belief with respect to the allegations in Paragraph 5 and therefore neither admits nor denies the same.

6. The allegations of Paragraph 6 are admitted, except defendant denies the agreement provided "certain benefits to plaintiff and his assignees."

7. The allegations of Paragraph 7 are admitted except defendant denies that it did not permit plaintiff and his [fol. 7] assignees to report on their regular shifts. For further answer, reference is made to Paragraph 12 of this Answer.

8. The allegations of Paragraph 8 are denied. For further answer, reference is made to Paragraph 12 of this Answer.

9. The allegations of Paragraph 9 are admitted, except the defendant denies (i) the allegation that there was no work available for the employees of the editorial department, business office and advertising department, and (ii) the allegation that the wages paid were in excess of $750,000.

10. The allegations of Paragraph 10 are denied.

11. The allegations of Paragraph 11 are denied.

12. Further answering, defendant says:

(a) During the period covered by the declaration the Newspaper Guild of Detroit, with the acquiescence

and consent of plaintiff and his alleged assignees, arbitrarily, arrogantly and wrongfully assumed the right to determine who, when and to what extent plaintiff, his alleged assignors and its members would perform work for this defendant and this defendant has the services of Guild members only at such times as the representatives of the Guild permitted.

(b) During the period covered by the Declaration, plaintiff and such of the persons named in Paragraph 4 of the Declaration as were or had been employees of defendant refused from time to time to work for defendant.

[fol. 8] (c) From time to time during the period covered by the Declaration, plaintiff and some of the persons named in Paragraph 4 of the Declaration did work for the defendant, and plaintiff and such persons were paid in full for all work so performed.

(d) During the period covered by the Declaration, defendant did not require the services of all those persons named in Paragraph 4 of the Declaration.

(e) During the period covered by the Declaration, all work which defendant desired or required to be performed in its plant departments consisting of janitors, watchmen and elevator operators was done by individuals who were or are believed by this defendant to have been members of the Newspaper Guild of Detroit.

(f) During the period covered by the Declaration neither plaintiff nor any of his assignees ever reported for work and were refused permission to work.

(g) During the period covered by the Declaration, defendant had no obligation to permit plaintiff or any of the persons named in Paragraph 4 of the Declaration to report for work nor to work nor was defendant obligated to pay for work not performed.

(h) The Court has no jurisdiction over the subject matter of this suit.

(i) The Declaration fails to state a cause of action.

[fol. 9] Wherefore, defendant claims a judgment herein, together with costs to be taxed, against plaintiff and in favor of defendant.

Butzel, Eaman, Long, Gust & Kennedy, By: Clifford W. Van Blarcom, Attorneys for Defendant, 1881 National Bank Building, Detroit 26, Michigan.

Dated: October 24, 1956.

In the Circuit Court of Wayne County, Michigan

Reply to Defendant's Answer—Filed November 1, 1956

Now comes the above named plaintiff, Doyle Smith, by his attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, and for reply to the Answer of the defendant, says:

1. Replying to Paragraph 12 of defendant's Answer, plaintiff says:

12(a) Replying to Paragraph 12(a), plaintiff denies the allegations contained therein.

12(b) Replying to Paragraph 12(b), plaintiff denies the allegations contained therein.

12(c) Replying to Paragraph 12(c), plaintiff denies the allegations contained therein.

12(d) Replying to Paragraph 12(d), plaintiff neither admits nor denies the allegations contained therein, and leaves defendant to its proofs.

12(e) Replying to Paragraph 12(e), plaintiff neither admits nor denies the allegations contained therein, and leaves defendant to its proofs.

[fol. 10] 12(f) Replying to Paragraph 12(f), plaintiff denies the allegations contained therein.

12(g) Replying to Paragraph 12(g), plaintiff denies the allegations contained therein.

12(h) Replying to Paragraph 12(h), plaintiff denies the allegations contained therein.

12(i) Replying to Paragraph 12(i), plaintiff denies the allegations contained therein.

Wherefore, plaintiff claims judgment in the amount of Twenty Thousand ($20,000.00) Dollars, together with interest, costs and attorney fees.

Rothe, Marston, Mazey, Sachs & O'Connell, By: William Mazey, Attorneys for Plaintiff, 3610 Cadillac Tower, Detroit 26, Michigan.

Dated: October 29, 1956.

In the Circuit Court of Wayne County, Michigan

Opinion on Motion of Defendant Evening News Association to Dismiss for Lack of Jurisdiction—Filed February 1, 1960

Facts

Plaintiff, individually and as assignee of forty-nine others, brings this action in assumpsit claiming damages in the amount of $20,000.00 for breach of a collective bargaining agreement made between the defendant and Newspaper Guild of Detroit (herein called "the Guild").

[fol. 11] Defendant is a Michigan corporation. It publishes a newspaper. The parties have agreed that it is engaged in interstate commerce.

Plaintiff and his assignors are all members of the Guild. They are also employees of defendant. Those members of the Guild who were employed by defendant were janitors, elevator operators and watchmen.

On December 1, 1955, and continuing until January 16, 1956, a group of employees of the defendant belonging to a union other than the Guild were on strike against defendant. Plaintiff claims that while the strike was in progress defendant permitted unorganized employees working in its editorial, business and advertising departments to report at defendant's premises and paid them their full wages. Plaintiff also claims he and those who assigned their claims to him (i.e., Guild members) were ready, able

and available for work during the strike but only a few were allowed to enter the struck premises and to work with the result that they lost considerable money in wages. Plaintiff further claims the refusal to pay full wages to Guild members plus the payment of full wages to the unorganized employees constituted discrimination against Guild members because of their membership. This he says was not only a discrimination but it is also a breach of the following covenant in the contract between the Guild and the defendant:

> "There shall be no discrimination against any employee because of his membership or activity in the Guild."

Defendant denies discrimination and partiality. It says that employees were retained in accordance with the need [fol. 12] for their services and not with reference to any membership in the Guild or any other organization; that certain aspects of the business had to be carried on at full strength and in fact at more than usual strength by reason of the strike and in spite of it; that news had to be gathered and preserved; that money had to be received and disbursed; that advertising contracts had to be serviced and that some of these activities were even increased by the strike rather than diminished.

This Court, if it proceeded to a trial on the merits, would be required to determine whether or not plaintiff and his assignees were discriminated against, by reason of their Guild membership, when defendant employed on a full time basis and paid its unorganized employees but did not do the same for all those employees who were Guild members. Such discrimination, if found to exist, would constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act, as amended (herein called "the Act").

Plaintiff, and each of his assignees, failed to file a charge with the National Labor Relations Board within the six-month period contemplated in the Act. Had a charge been filed and a complaint been issued under the Act, the Board would have had the right on proper findings—not only to

reinstate but also to award back pay. (Section 10(c)). However, since plaintiff and his associates failed to file a charge no complaint can now be issued under the Act. (Section 10(b) of the Act.) Instead of filing a charge, in October of 1956—more than six months after the conclusion of the strike and the events above mentioned—plaintiff commenced this suit at law.

[fol. 13] Defendant plead that the Court has no jurisdiction over the subject matter of the suit. This defense was based upon the claim that the subject had been pre-empted by the Labor-Management Relations Act, 1947, as amended (i. e., the Act). At the opening of the trial, defendant moved to dismiss for lack of jurisdiction on the following grounds:

1. Defendant is charged with acts, which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and

2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter.

The issue this Court is now called upon to decide, by reason of defendant's defense and motion, can be stated as follows:

> Does a state court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true constitute both a breach of such contract and also an unfair labor practice under the provisions of Section 8(a) of the Act?

Opinion

Plaintiffs have charged defendant with committing what constitutes a statutory unfair labor practice of discriminating against them by reason of their union membership. This is an area which the federal government has pre-empted

and placed in the exclusive control of the National Labor Relations Board.

[fol. 14] More than twelve years ago, before the United States Supreme Court had considered the subject, the Circuit Court of Appeals for the 4th Circuit, in *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, concluded that recompense of lost wages on account of an unfair labor practice is a matter for the labor board.

Plaintiff in this case is attempting to circumvent the exclusive remedy afforded him in the Act by declaring on the contract. It seems that he should be unable to succeed. The case of *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L. Ed. 228 (1953), held that the National Labor Relations Board has exclusive jurisdiction of unfair labor practices. In that case the plaintiff had 24 employees, four of whom were members of defendant union. Defendant engaged in what was an unfair labor practice under the Act. It placed pickets, none of whom were employees of plaintiff, at plaintiff's loading platform to induce and coerce plaintiff's employees to join the union. Drivers from other unions refused to cross the picket line, as a result of which plaintiff's business fell off as much as 95 per cent. The Supreme Court of the United States stated that this was a matter for the National Labor Relations Board, not for the state courts, and that the need for uniformity in applying the Act necessitated centralized administration in one body. Thus the state and federal courts are pre-empted from deciding unfair labor practices. The Court also discussed the importance of public and private rights, saying, at page 500:

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended [fol. 15] by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

See also *Grimes & Hauer, Inc. v. Rollait, et al.*, 127 N.E. 203 (1955) holding, among other things, that both public and private rights are comprehended in the Act. The *Garner* case has been followed extensively and is considered to be the leading case on the pre-emption doctrine as it applies to unfair labor practices.

Weber, et al. v. Anheuser Busch, Inc., 384 U.S. 468, 99 L. Ed. 546 (1955) affirmed the *Garner* case. In that case the union struck and picketed an employer's plant to compel the employer to insert into a contemplated collective bargaining contract a clause obligating the employer to employ, for repair or replacement of machinery, only contractors who had collective bargaining agreements with that union. Employer filed charges of unfair labor practices under Section 8(b), (4), (D) of the Act. The National Labor Relations Board quashed notice of the hearing, holding that no "dispute" existed within the meaning of that subsection. Before the Board acted, the employer sought an injunction against the union in a Missouri state court alleging a secondary boycott and also a violation of Subsections (A), (B) and (D) of 8(b) (4) of the Act. A permanent injunction was issued by the State Court after the Board found no violation of Section 8(b), (4), (D). Upon certiorari to the Supreme Court of the United States, that Court said in part:

> [fol. 16] "A state may not enjoin, under its own labor statute, conduct which has been made an 'unfair labor practice' under the federal statutes. Such was the holding in the Garner case (U.S.), *supra*.
>
> The Court pointed out that exclusive jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board."

Then, after finding that the Board had not ruled that no unfair labor practice was involved but only that there was no violation of subsection (D) of Section 8(b), (4), the Court said, at page 479:

> "Respondent itself alleged that the union conduct it was seeking to stop came within the prohibitions of the federal act, and yet it disregarded the Board and

> obtained relief from a State Court. It is perfectly clear that had respondent gone first to a Federal Court, instead of the State Court, the Federal Court would have declined jurisdiction, at least as to the unfair labor practices on the ground that exclusive primary jurisdiction was in the Board. As pointed out in the Garner case, the same considerations apply to the State Courts."

And, at page 481:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that Act, the State Court must decline jurisdiction in deference to the tribunal [fol. 17] which Congress has selected for determining such issues in the first instance."

In harmony with these decisions, certain other cases should specifically be mentioned. The case of *Saeger* v. *Emerson Electric Mfg. Co.*, 303 S.W. 2d 35 (1957) (Certiorari denied in 355 U.S. 894), was an action to recover damages upon the theory that the employer and others had conspired to discharge plaintiffs because of union activities and in breach of their employment contract. The gist of the plaintiff's allegations was a charge of an unfair labor practice (i.e., a discrimination on account of union activities) and the damages sought were the loss of wages. The Court pointed out that with few exceptions—such as common law torts accompanied by violence—the clear import of the federal cases now is that state courts may not exercise jurisdiction as to those matters constituting unfair labor practices under the federal act. The Court held that exclusive jurisdiction was vested in the National Labor Relations Board and dismissed the case.

In *United Electrical, Radio and Machine Workers of America, et al.* v. *General Electric Co.*, D.D. 231 F. 2d 259 (1956), a union and one of its members sought injunctive

relief and damages for breach of contract due to the discharge of plaintiff because he had invoked the Fifth Amendment, which is in effect saying the Company committed an unfair labor practice. The Court followed the *Garner* decision, dismissing for lack of jurisdiction, and again made it clear that jurisdiction is vested in the National Labor Relations Board. The Court also said, at page 261, footnote 1:

> "The circumstance that the facts alleged in the present complaint, constituting an unfair labor practice, [fol. 18] are in the nature of a breach of contract and not, like the facts in the Garner case, in the nature of a tort, would not authorize the District Court or this court to create an exception to the Garner rule and assert jurisdiction before the Board has been asked to exercise it."

The doctrines of these cases seem to have been followed almost without exception and have left little doubt as to the exclusive nature of federal (as distinguished from state) jurisdiction over unfair labor practices. See also *Bett Mfg. Co. v. Local 810*, 136 N.Y.S. 2d 865 (1954); *Bearden v. Coker*, 291 S.W. 2d 790 (1956); *[illegible] Mfg. Co. v. International Ladies Garment Workers Union, AFL*, 269 S.W. 2d 409 (1954); *T & C [illegible] v. Local Union No. 328*, 355 Mich. 26; *Davidson v. Carpenters' District Council*, 356 Mich. 557; *Guss v. Utah*, 353 U.S. 1; *Amalgamated v. Fairlawn*, 353 U.S. 20; *San Diego v. Garmon*, 353 U.S. 26. See also the recent case of *Grand Lodge v. [illegible]*, 341 Pac. 2d 989, in which an injunction was sought in the Kansas court to enjoin the violation of a collective bargaining contract expressly prohibiting "discrimination for engaging in union activity" and in which case the Court, in dismissing the complaint for lack of jurisdiction over the subject matter, because of pre-emption, reviewed the decisions and said: "*that a plaintiff may not [illegible] an action which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress that jurisdiction of such matters be vested exclusively in the National Labor Relations Board.*"

If the case at bar involved merely a breach of contract, without an unfair labor practice, and was instituted by the [fol. 19] union in a federal district court, then a suit could be successfully prosecuted from a jurisdictional standpoint, at least in a federal court. See *UAW, Local 286 v. Wilson Athletic Goods Mfg. Co., Inc.* (N.D.), 119 F. Supp. 948 (1950). Such, however, is not the case here. Plaintiff is suing as an individual, in a state court, for breach of contract involving an unfair labor practice, and is seeking back wages, a remedy which the National Labor Relations Board is empowered to grant under Section 10(c).

The only apparent exceptions to the presently strict preemption doctrine seem to arise in cases involving violent torts and in cases where an employee is suing the union for reinstatement. Courts allow suits in the state courts in three tortious situations: (1) Mass picketing; (2) Violence; (3) Overt threats of violence. The reason given in these cases is that if is necessary, under the state police power, to preserve the peace, safety, etc., of the state. If parties were required to wait until the National Labor Relations Board found an unfair labor practice before issuing its order, the violence, intimidation, etc., would mushroom entirely uncontrolled. Thus an exception has been made in cases where violence is involved. See *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 98 L. Ed. 1025 (1954); *United Automobile, Aircraft and Agricultural Implement Workers v. Wisconsin Employment Relations Board*, 351 U.S. 266 (1956); *Johnston, et al. v. Colonial Precision Co., Inc.* (Mass.), 128 F. Supp. 954 (1954), and, *UAW v. Russell*, 356 U.S. 634.

Counsel for plaintiff seems to rely heavily upon the *Russell* case as standing for the proposition that a state court has jurisdiction of an action by an employee against [fol. 20] an employer for breach of a collective bargaining contract which also involves an unfair labor practice. The *Russell* case is merely another example of a situation involving violence. In this case the plaintiff was forcibly prevented from crossing a picket line. Plaintiff brought an action for the tort of wrongful interference with a lawful occupation. The Court carefully confined its opinion

to situations involving violence, threats thereof, or mass picketing and referred to the *Laburnum* case.

The second exception arises in cases where a union member sues his union for restoration of his membership and/or damages due to illegal expulsion. In *Reed* v. *Curran*, 138 N.Y.S. 2d. 809 (1955), the plaintiff sued the union in a state court for reinstatement and for a declaration that his expulsion was void. His expulsion was due to a conviction of a narcotics charge fifteen years prior to his union membership. The Court held that although the National Labor Relations Board must determine the question of an unfair labor practice, state courts are not precluded from restoring membership to a wrongfully expelled member of the union. In *I.A.M.* v. *Gonzales*, 42 LRRM 2135, 356 U.S. 617 (1958), the second case on which counsel for the plaintiff so heavily relies, the state court allowed a suit by an expelled union member against his union for restoration of his membership and for damages due to his illegal expulsion. Again the Court specifically limited its decision to this type of factual situation and to suits between a union and one of its members. Mr. Justice Frankfurter took pains to point out that this was not a suit to remedy employer discrimination. He said, at page 2137:

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to [fol. 21] bring about employer discrimination against an employee, the evil the Board is concerned to strike at is an unfair labor practice under Section 8(b)(2). * * * A state court decision requiring restoration of membership requires consideration of a judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership."

The above mentioned cases are the only apparent exceptions to the strict pre-emption doctrine as it is applied to unfair labor practices. The case at bar falls into neither category.

Plaintiff cites several other cases which, upon analysis, are found to be quite different from and not controlling of the issues involved in the case at bar. For example, the following, most of which also arose prior to the teachings in the United States Supreme Court cases of *Garner* and *Weber, et al., supra*:

(1) *Textile Workers Union v. Arista Mills*, 193 F. 2d 529 (CCA, 4th Cir. 1951). This was an action under Section 301(a) of the Act involving a dispute between *a union and an employer in a federal court*. The suit was for breach of a collective bargaining agreement. The relief asked was declaratory judgment, an injunction and damages. The dispute involved *reinstatement and seniority provisions* of a contract. The Court held for the union but not on jurisdictional grounds, saying, at page 533:

> "We do not mean to say that merely because a bargaining contract may forbid unfair labor practices, courts have jurisdiction to afford relief against them [fol. 22] under the guise of relieving against breaches of contract * * *"
>
> "We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the N.L.R.B. Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute an unfair labor practice within the meaning of this act."

In this case there was also a complaint filed with the National Labor Relations Board, a procedure absent, and vitally so, in the case at bar. This case was decided before the *Garner* case and without benefit of that opinion.

(2) *Reed v. Fawick*, D.C., 86 F. Supp. 822 (1949), also decided before the *Garner* case and also a suit in a federal court under Section 301(a) of the Act. In this case the

individual plaintiffs were dropped as parties by agreement because of Section 301(a), thus meeting the requirements of that section. This case was a suit charging an unfair labor practice of refusing to bargain collectively and the act of encouraging the organization of rival unions on the premises. The Court separated the unfair labor practice from the contract portion and took jurisdiction of the latter while declining to do so in reference to the unfair labor practice charge.

(3) *Modine Mfg. Co.* v. *I.A.M.*, 216 F. 2d 326 (CCA 6th Circuit, 1954). Again a suit in a federal court under Section [fol. 23] 301(a) by a labor union against an employer.

(4) *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45. This too is a suit between an employer and a union in the federal court under Section 301(a) of the Act.

(5) *United Telephone Co. of the West and United Utilities*, 112 NLRB 779. This case is a Board decision and it did not deal with a pre-emption problem.

By failing to invoke the proper procedure of filing a charge with the National Labor Relations Board within the six-month statutory period, by charging facts which are both an unfair labor practice as well as a contract violation, and by bringing this action in a state court, plaintiff is precluded from recovery in the instant case. The National Labor Relations Board had the power to award back pay even if there is no discharge and reinstatement problem. See Sec. 10(c). Furthermore, no specialized damages have been asked which the National Labor Relations Board would have been powerless to give. The need for uniformity in applying the provisions of the Labor-Management Relations Act still prevails over the argument that state courts should entertain suits in situations of the type present in this case. The facts, as presented, do not require immediate action as is so often the case where violent torts have been threatened or committed. Finally, in order to allow recovery on the contract, this Court would be required to find discrimination of a kind which would also be an unfair

labor practice and thus subject to correction by the National Labor Relations Board.

In view of the cases cited in this opinion, defendant's motion to dismiss for lack of jurisdiction should be granted. [fol. 24] An order may be entered consistent with this opinion.

Miles N. Culehan, Circuit Judge.

In the Circuit Court of Wayne County, Michigan

Order of Dismissal—Filed February 11, 1960

At a session of said Court, held in the City-County Building, City of Detroit, Wayne County, Michigan, this 11th day of February, A.D. 1960.

Present: Honorable Miles N. Culehan, Circuit Judge.

This Court, having considered the oral arguments in open court and the written briefs submitted by counsel for both parties on defendant's Motion to Dismiss, and having concluded that this Court lacks jurisdiction;

Now, Therefore, It Is Ordered that this cause be and the same hereby is dismissed.

Miles N. Culehan, Circuit Judge.

In the Circuit Court of Wayne County, Michigan

Certificate That Amount in Controversy Exceeds the Sum of $500.00—February 29, 1960

(Filed March 1, 1960)

I, Miles N. Culehan, Circuit Judge of the Wayne Judicial Circuit, on the hearing of the above cause, do hereby certify that the action is one at law, and that the controversy actually involves the sum of more than Five Hundred ($500.00) Dollars.

Miles N. Culehan, Circuit Judge.

Dated: February 29, 1960.

[fol. 25]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Appellee's Appendix

IN THE CIRCUIT COURT OF WAYNE COUNTY—MICHIGAN

PRE-TRIAL STATEMENT—Filed February 17, 1958

The plaintiff individually and as assignee of forty-nine others similarly situated, brings this action for damages for breach of collective bargaining contract with the defendant newspaper publisher. The plaintiffs are members of the Newspaper Guild of Detroit and comprise three categories of employees—janitors, elevator operators and watchmen. During the newspaper strike of December 1955 to January 1956, when the three Detroit papers were down, plaintiff claims that they were laid off, entirely because of their membership in the Guild, and that this was a discrimination which was forbidden by the contract, reading as follows (Article 4, Section 5): "There shall be no discrimination against any employee because of his membership or activity in the Guild."

This action is brought to recover money damages, the measure of which is the pay they would have received during the lay-off under the contract. The position of the defendant publisher is that when lightning struck it was necessary to make a complete readjustment of the employee situation, and in so doing the watchmen were kept on full time, as they had been before the strike, the janitors were given staggered employment, if desired, sufficient to meet the reduced needs of their service, and the same was done with the elevator operators. Obviously, defendant contends, the need for these services was reduced by reason of the drastic change in the defendant's operation, and whatever adjustment was made was made because of the [fol. 26] necessity of a readjustment and without any discrimination or partiality being involved.

Plaintiff's position is that many employees of the paper were retained on a full-time basis, and that if any were so retained it was the contractual right of all the plaintiffs to be retained on the same basis. The failure to do

this amounts, according to the plaintiff, to a discrimination based on Guild membership, in violation of the contract. By way of illustration, plaintiff contends that if all of the employees in the Advertising Department or in the Editorial Department or in the Cashier's Department were retained on a full-time basis, every member of the Guild had a right to be retained on the same basis.

Meeting this contention the defendant says that employees were retained in accordance with the need of their services and not with reference to any membership in the Guild or any other organization; that certain aspects of the business had to be carried on at full strength, and in fact at more than usual strength by reason of the strike and in spite of it; that news had to be gathered and preserved, that money had to be received and disbursed, that advertising contracts had to be serviced, and that some of these activities were even increased by the strike, rather than diminished. Defendant's position that it was best qualified to determine, as it had a right to determine, the extent to which employees' service was necessary in these various areas, and that such services being graduated and employment being correspondingly graduated, resulted in a differentiation in employment. Defendant denies that there was any failure to employ the plaintiffs by reason of their membership in the Guild, as demonstrated by the fact that members of the Guild were em-
[fol. 27] ployed full-time as watchmen and part-time as janitors and elevator operators, as needed.

Plaintiffs rationalize their position by saying that if non-members of the Guild were employed full time and any members of the Guild were employed only part time or not at all during the strike, it follows necessarily that the variation between the two groups flows from a discrimination against the Guild members, and from no other possible cause. Plaintiffs' contention is that the non-Guild group was kept on at full time despite the fact that there was not enough work to keep them busy and that favoritism was shown in protecting their earnings in spite of idleness, as against the partial hiring or nonhiring of the Guild members.

Let's be blunt about it! If this Court could settle this controversy, it could settle the difference between the Western Powers and Russia. I know when I'm licked.

There has been a series of amendments to pleadings, but it is understood that the plaintiffs proceed to trial upon the second amended declaration filed January 2, 1958, to which the answer of the defendants to the original declaration is deemed adequate. In that answer the defendant has pleaded that this court has no jurisdiction of this controversy, a subject which has been preempted by the Labor-Management Relations Act of 1947 (The Taft-Hartley Act). It is stipulated that the defendant corporation is engaged in interstate commerce for the purpose of raising this point. This is a very interesting legal question which I bequeath to the trial judge with my blessing.

With this last word the pleadings are satisfactory, discovery has been completed. No jury has been demanded, [fol. 28] and the trial should require not less than one week.

The question of jurisdiction, above indicated, should properly be disposed of first, before extensive testimony is taken.

This statement should not be regarded as a limitation of the contentions of either party, as set forth in their pleadings. Both parties make extensive claims in detail which are too elaborate to be included in this statement.

[fol. 30] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

DOYLE SMITH, Plaintiff and Appellant,

v.

EVENING NEWS ASSOCIATION, a Michigan corporation, Defendant and Appellee.

OPINION—January 9, 1961

Before the Entire Court.

Kavanagh, J.

Plaintiff and his assignors are employees of defendant Evening News Association and are members of a labor organization, the Newspaper Guild of Detroit. The Guild had a collective bargaining agreement with defendant which provided, among other things:

"There shall be no discrimination against any employee because of his membership or activity in the Guild."

A group of employees of defendant belonging to a union other than the Guild went on strike. Defendant permitted employees of the editorial department, business office and advertising department, who were not covered by a collective bargaining agreement, to report on the premises and they were paid full wages even though there was no work available.

Plaintiff and his assignors were willing to work but defendant permitted only a few to work and, as a result, plaintiff and his assignors lost considerable money in wages.

[fol. 31] Plaintiff contends that defendant's refusal to pay full wages to plaintiff and his assignors and defendant's payment of full wages to other employees constituted discrimination against an employee because of his membership or activity in the Guild and, therefore, was a violation of the contract provision above quoted.

Plaintiff brought this action in the circuit court for the county of Wayne to recover damages for such breach.

Defendant moved to dismiss for lack of jurisdiction on the following grounds:

"1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and

"2. The National Labor Relations Board has been vested by virtue of such amended act with exclusive jurisdiction of the subject matter."

The trial judge granted the motion to dismiss for lack of jurisdiction on the theory that Congress in adopting the

National Labor Relations Act had pre-empted the field and placed the question of a statutory unfair labor practice exclusively within the control and jurisdiction of the National Labor Relations Board.

Plaintiff appeals, and we are presented with the following question:

"Does a State court have jurisdiction of an action at law [fol. 32] by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the National Labor Relations Act as amended?"

For the purpose of the decision on this particular motion to dismiss it was stipulated that defendant was engaged in commerce within the meaning of the National Labor Relations Act as amended. It should be further noted that plaintiff failed to bring a complaint to the Board under the unfair labor practices provisions of the National Labor Relations Act until after the expiration of the statutory period provided for the bringing of such complaint.

Plaintiff argues that under the decisions of the United States supreme court Congress has not pre-empted the entire labor field. He contends there are numerous exceptions to the rule. He argues that the case of Garner v. Teamsters Union, 346 US 485, stands only for the proposition that peaceful picketing of the premises of an employer engaged in commerce may not be enjoined by a State court. He points out as an exception to the general rule that in the case of United Workers v. Laburnum Corp., 347 US 656, where plaintiff sought damages in a State court from a union for engaging in coercive conduct, which conduct [fol. 33] was also an unfair labor practice, the United States supreme court affirmed the right of plaintiff to damages against the union on the theory that Congress, in the National Labor Relations Act, had not provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. Plaintiff refers to the case of United

Automobile Workers v. Russell, 356 US 634, where the United States supreme court did not deprive the Alabama State court of jurisdiction where it had allowed an employee to recover damages from a union even where the union's conduct constituted an unfair labor practice and the National Labor Relations Board had jurisdiction to award back pay to the employee. Plaintiff calls particular attention to the fact that in the Russell Case the court indicated there are cases in which there is a possibility that both the Board and the State court have jurisdiction to award lost pay.

Plaintiff contends this is simply an action for damages for breach of contract. He claims State courts have traditional and statutory jurisdiction to grant such relief.

Defendant, on the other hand, relying upon almost the same cases, contends that they hold that pre-emption exists limiting the jurisdiction of State courts in an action for damages for breach of contract when such action also constitutes an unfair labor practice.

[fol. 34] Section 8(a) of the National Labor Relations Act provides in part as follows:

"It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

Section 10(c) of the act provides in part as follows:

"If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act * * *."

Whether plaintiff can maintain his action in the State court is entirely dependent upon whether Congress pre-

empted the field as to this kind of action and vested exclusive jurisdiction in the National Labor Relations Board. This is, to say the least, a difficult question.

The United States supreme court itself has found difficulty in reconciling the effect and meaning of its decisions on this field of law. It seems we must start with the general premise that Congress has pre-empted the field in labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in the National Labor Relations Board to determine such labor disputes where labor practices are either prohibited or protected by the Labor Management Relations Act.

[fol. 35] In determining whether this is always true we turn to the latest available position on this subject—the discussion in San Diego Building Trades Council v. Garmon, 359 US 236. There, the respondents, copartners in the business of selling lumber in California, began an action in the Superior court for the county of San Diego asking for an injunction and damages. The unions sought from respondents an agreement to retain in their employ only those workers who were already members of the union or who applied for membership within 30 days. Respondents refused until one of the unions had been designated as the collective bargaining agent. The unions began at once peacefully picketing respondents' place of business and exerting pressure on customers and suppliers in order to persuade them to stop dealing with respondents. The trial court found that the sole purpose of these pressures was to compel execution of the proposed contract. The unions protested this finding, claiming the purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement. The court also awarded $1,000 damages for losses found to have been sustained. The United States supreme court granted certiorari and decided the matter along with Gus v. Utah Labor Relations Board, 353 US 1, and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 US 20, holding that the refusal of the National Labor Relations Board to assert jurisdic-

[fol. 36] tion did not leave with the States power over activities they otherwise would be pre-empted from regulating. In vacating and remanding the judgment of the California court (353 US 26) the United States supreme court pointed out that the Guss and Fairlawn cases involved relief of an equitable nature and controlled the injunctive question, but remanded to the State court the question of whether the judgment for damages would be sustained under California law. On remand, the State court sustained the award of damages. The California court held that those activities constituted a tort based on an unfair labor practice under State law. In so holding, the court relied on general tort provisions of the California civil code as well as State enactments dealing specifically with labor relations. The United States supreme court again granted certiorari. Justice Frankfurter delivered the opinion of the court. After pointing out the difficult situation presented to that court in construing the National Labor Relations Act, he said (p. 240):

"This court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process."

He then discussed all the earlier cases on this subject and concluded by saying (pp. 244-246):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct [fol. 37] so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial

relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

"At times it has not been clear whether the particular activity regulated by the States was governed by section 7 or section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board. Whatever the scope of this court's authority cannot coexist with a State's power and State jurisdiction too must yield to the exclusive primary competence of the board. See, e. g., *Garner v. Teamsters Union*, 346 US 485, especially at 490-501; *Weber v. Anheuser-Busch, Inc.*, 348 US 468."

"The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning union constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted."

[fol. 38] "To require the States to defer to the primary jurisdiction of the National Board does not require Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by section 7 or prohibited by section 8, then the matter is at an end, and the States

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See *Weber v. Anheuser-Busch, Inc.*, 348 US 468, in which it was pointed out that the State court was not free to disregard restraint of trial statute. Cf. *Amalgamated Workers v. Wisconsin Board*, 351 US 266. The case before us involves a law of general application and specialized labor relations statute.

are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States.[1] However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the general counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this court to decide whether such activities are subject to State jurisdiction. The withdrawal of this narrow area from possible State activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

"In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of section 7

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[1] See *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245. The approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.

[2] "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition." *Charleston & W. Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604."

or section 8 of the act, the State's jurisdiction is displaced. [fol. 39] Justice Frankfurter went on to say (pp. 247-248):

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 US 634; *United Construction Workers* v. *Laburnum Corp.*, 347 US 656. We have also allowed the States to enjoin such conduct. *Youngdahl* v. *Rainfair*, 355 US 131; *Auto Workers* v. *Wisconsin Board*, 351 US 266. State jurisdiction has prevailed in these situations because the compelling State interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers* v. *Laburnum Corp.*, 347 US 656, found support in the fact that the State remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e., 'intimidation and threats of violence.'"

Justice Harlan, writing a concurring opinion in the same case, in discussing the majority opinion said (pp. 250-254):

"The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all State power. *Hill* v. *Florida*, 325 US 538; *Automobile Workers* v. *O'Brien*, 339 US 454; *Motor Coach Employees* v. *Wisconsin Board*, 340 US 383. That threshold question was squarely faced in the *Russell* case, where the court, at page 640, said: 'At the outset, we note that the union's activity in this case clearly was not protected by federal law.' The same question was, in my view, necessarily faced in *Laburnum*.

"In both cases it was possible to decide that question without prior reference to the National Labor Relations Board because the union conduct involved was violent, and

as such was of course not protected by the federal act. Thus in *Laburnum*, the pre-emption issue was limited to the 'type of conduct' before the court. 347 US, at 658. Similarly in *Russell*, which was decided on *Laburnum* principles, the court stated that the union's activity 'clearly was not [fol. 40] protected,' and immediately went on to say (citing prior 'violence cases'[1]) that 'the strike was conducted in such a manner that it could have been enjoined' by the State. 356 US, at 640. In both instances the court, in reliance on former 'violence' cases involving injunctions, might have gone on to hold, as the court now in effect says it did, that the State police power was not displaced by the federal act, and thus disposed of the cases on the ground that State damage awards, like State injunctions, based on violent conduct did not conflict with the federal statute. The court did not do this, however.

"Instead the relevance of violence was manifestly deemed confined to rendering the *Laburnum* and *Russell* activities federally unprotected. So rendered, they could then only have been classified as prohibited or 'neither protected nor prohibited.' If the latter, state jurisdiction was beyond challenge. *Automobile Workers* v. *Wisconsin Board*, 336 US 245. Conversely, if the activities could have been considered prohibited, primary decision by the board would have been necessary, if State damage awards were inconsistent with federal prohibitions. *Garner* v. *Teamsters Union*, 346 US 485. To determine the need for initial reference to the board, the court assumed that the activities were unfair labor practices prohibited by the federal act. *Laburnum*, *supra*, at 660-663; *Russell*, *supra*, at 641. It then considered the possibility of conflict and held that the State damage remedies were not pre-empted because the federal act afforded no remedy at all for the past conduct involved in *Laburnum*, and less than full redress for that involved in *Russell*. The essence of the court's holding, which made resort to primary jurisdiction unnecessary,

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"[1] *Youngdahl* v. *Rainfair, Inc.*, 355 US 131; *Automobile Workers* v. *Wisconsin Board*, 351 US 266.

"[2] See *Allen-Bradley Local* v. *Wisconsin Board*, 315 US 740.

is contained in the following passage from the opinion in *Laburnum*, *supra*, at 665 (also quoted in *Russell*, *supra*, at 644):

> "'To the extent that congress prescribed preventive procedure against unfair labor practices, that case [*Garner* v. *Teamsters Union*, *supra*,] recognized that the act excluded conflicting State procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties [fol. 41] or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between State and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the State procedure would have survived.'

"Until today this holding of *Laburnum* has been recognized by subsequent cases. See *Weber* v. *Anheuser-Busch, Inc.*, 348 US 468, 477; *Automobile Workers* v. *Russell*, *supra*, at 640, 641, 644; *International Assn. of Machinists* v. *Gonzales*, 356 US 617, 621, similarly characterizing *Russell*; see also the dissenting opinion in *Gonzales*, especially at 624-626.*

"The court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable board delays, may render State redress ineffective. And in instances in which

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* The same view is taken of *Laburnum* and *Russell* in the *amici* briefs filed in the present case by the government and the American Federation of Labor and Congress of Industrial Organizations, the latter stating that "we hope to argue in an appropriate case that the *Russell* decision should be overruled."

the board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the board, as we observed in *Russell*, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the board does accept jurisdiction.

"I am, further, at loss to understand, and can find no basis on principle or in past decisions for, the court's intimation that the States may even be powerless to act when the underlying activities are clearly 'neither protected nor prohibited' by the federal act. Surely that suggestion is foreclosed by *Automobile Workers* v. *Wisconsin* [fol. 42] *Board*, 336 US, *supra*, as well as by the approach taken to federal pre-emption in such cases as *Allen-Bradley Local* v. *Wisconsin Board*, supra, *Bethlemen Steel Co.* v. *New York Board*, 330 US 767, 773, and *Algoma Plywood Co.* v. *Wisconsin Board*, 336 US 301, not to mention *Laburnum* and *Russell* and the primary jurisdiction doctrine itself.[5] Should what the court now intimates ever come to pass, then indeed State power to redress wrongful acts in the labor field will be reduced to the vanishing point.

"In determining pre-emption in any given labor case, I would adhere to the *Laburnum* and *Russell* distinction between damages and injunctions and to the principle that

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[5] The court may be correct in stating that 'the approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no pre-emption when the conduct charged is in fact neither protected nor prohibited. To the contrary; that holding has remained fully intact, and, as already noted, underlay the decisions in *Laburnum* and *Russell*.

"[6] If the 'neither protected nor prohibited' category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see *International Assn. of Machinists* v. *Gonzales*, 356 US 617."

State power is not precluded where the challenged conduct is neither protected nor prohibited under the federal act. Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision. "

[fol. 43] There can be no question from the concurring opinion of Justice Harlan that he believed the majority opinion had limited the State power to redress wrongful acts in the labor field to the vanishing point, whether the acts were federally prohibited or federally protected. It is equally evident that Justice Harlan and those who concurred in his opinion believed that, where it is fairly debatable whether the conduct involved is federally protected, Congress has pre-empted the field so as to prevent State action.

The question in the instant case, then, is whether the alleged discrimination on the part of defendant-appellee would constitute an unfair labor practice under the National Labor Relations Act, particularly under sections 7 or 8 thereof. It is agreed for the purpose of this case that the action alleged as constituting a breach of contract would also constitute an unfair labor practice. Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress—that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair labor practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and [fol. 44] thereby circumvent the plain mandate of Congress.

In the instant case the damages would appear to be the loss of wages. The National Labor Relations Board under section 10(c) of the act has adequate authority to adjust the wrong by requiring the payment of back wages.

Since it is, to say the least, fairly debatable whether the conduct here involved is federally protected, then under

both the majority and concurring opinions of *Garmon*, the judgment of the trial court must be affirmed. Defendant shall have costs.

Signed: Thomas M. Kavanagh, Eugene F. Black, Harry F. Kelly, John R. Dethmers, Leland W. Carr, Talbot Smith, George Edwards, Theodore Souris.

[File endorsement omitted]

[fol. 45]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

48675

DOYLE SMITH, Plaintiff and Appellant,

vs.

EVENING NEWS ASSOCIATION, Defendant.

JUDGMENT—January 9, 1961

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiff its costs, to be taxed, and that it have execution therefor.

[fol. 46] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 47]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960.

SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 7, 1961.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May fifteenth, 1961.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of April, 1961.

[fol. 48]

SUPREME COURT OF THE UNITED STATES

No. 89—October Term, 1961

DOYLE SMITH, Petitioner,

vs.

EVENING NEWS ASSOCIATION

ORDER ALLOWING CERTIORARI—March 26, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted. The

Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

March 26, 1962

Mr. Justice Whittaker took no part in the consideration or decision of this application.

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961 1962

DOYLE SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

THOMAS E. HARRIS
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Washington 6, D. C.

Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. ....

DOYLE SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Doyle Smith prays that a writ of certiorari issue to review the decision and order of the Supreme Court of Michigan, both entered on January 9, 1961, affirming the order of the Circuit Court of Wayne County that this cause be dismissed.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Wayne County is unreported and is printed in Appendix B hereto, *infra*, p. 15. The opinion of the Supreme Court of Michigan has not yet been officially reported, but is unofficially reported in 106 N.W.2d 785, and is printed in Appendix B hereto, *infra*. p. 28.

JURISDICTION

The opinion and order of the Supreme Court of Michigan were entered on January 9, 1961 (p. 41, *infra*). On April 7, 1961, Mr. Justice Stewart extended the time for filing petition for writ of certiorari to and including May 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(c), because a title, right, privilege or immunity was claimed under the Constitution or statutes of the United States, which claim was sustained by the Supreme Court of Michigan.

QUESTION PRESENTED

Whether a suit for damages for breach of a collective bargaining agreement may be maintained in a state court, when the conduct constituting the breach of contract is also an unfair labor practice under the National Labor Relations Act.

STATUTE INVOLVED

The statutory provisions involved are Section 7, Section 8(a)(1), Section 8(a)(3), and the first sentence of Section 10(a) of the National Labor Relations Act, as amended; and the first sentence of Section 203(d) and Section 301(a) of the Labor Management Relations Act, 1947, as amended; 61 Stat. 136 ff, 29 U.S.C. §§ 141 ff. These provisions are printed in Appendix A, *infra*, p. 12.

STATEMENT

This is an action at law to recover damages for breach of contract, filed in the Circuit Court of Wayne County, Michigan.

The second amended declaration alleged:

Plaintiff (petitioner here) and his assignors are and were employees of respondent, and are and were members of a labor organization, the Newspaper Guild of Detroit, here-

inafter called the Guild. (2a-3a.)[1] The Guild and respondent entered into successive collective bargaining agreements which provided, among other things, that (4a):

> "There shall be no discrimination against any employee because of his membership or activity in the Guild."

While these agreements were in effect a group of respondent's employees belonging to a union other than the Guild went on strike. (4a.) During this strike respondent permitted employees in certain departments, who were not covered by any collective bargaining agreement, to report on the premises, and paid them full wages, even though there was no work available. (4a-5a.) However, although petitioner and his assignors were ready to work during the strike respondent allowed only a few of them to enter the premises, and as a result petitioner and his assignors lost considerable money in wages. (4a-5a.) Respondent's refusal to pay full wages to petitioner and his assignors during the strike, while paying full wages to other employees, was in violation of the contract provisions set forth above. (5a.)

Respondent's answer denied certain of these allegations and asserted that "[t]he Court has no jurisdiction over the subject matter of this suit." (8a.)

How the Federal Question is Presented. At the opening of the trial respondent moved to dismiss for lack of jurisdiction on the following grounds (13a; p. 17, *infra*):

> "1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and
>
> "2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter."

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[1] References followed by the letter "a" are to the printed Appellant's Appendix, which is part of the record certified by the Clerk of the Supreme Court of Michigan.

The parties stipulated, for purposes of the motion, that respondent, which publishes a newspaper, is engaged in commerce within the meaning of the National Labor Relations Act, as amended. (11a; pp. 15, 29-30, *infra*).

The trial court granted the motion to dismiss. It pointed out that the facts alleged, if true, constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act, and held that (13a; p. 18, *infra*):

> "• • • This is an area which the federal government has preempted and placed in the exclusive control of the National Labor Relations Board."

The Supreme Court of Michigan affirmed. It held *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, to be controlling, and declared (p. 40, *infra*):

> "• • • Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress —that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices."

REASONS FOR GRANTING THE WRIT

1. This case presents an additional aspect of the issues before the Court in *Teamsters Local 174* v. *Lucas Flour Co.*, No. 716, certiorari granted April 3, 1961, and *Charles Dowd Box Co.* v. *Courtney*, No. 641, certiorari granted February 20, 1961, which have been set for argument together at the next Term. Review of this case in conjunction with those cases would aid the Court in its consideration of the various interrelated questions.

Teamsters Local 174 v. *Lucas Flour Co.*, No. 716, is a suit brought in a state court in Washington by an employer against a union for damages allegedly resulting from a strike. The Supreme Court of Washington ruled that the strike, which was in protest against the discharge of an

employee, was in violation of a collective bargaining agreement between the parties, although that agreement did not contain a no-strike clause; that the strike was neither prohibited nor protected activity under the National Labor Relations Act; and that under the decision of this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, the NLRB therefore did not have exclusive primary jurisdiction, and the state courts did have jurisdiction.

Teamsters Local 174 and the present case differ in that in this case the parties agree that the conduct alleged to constitute a breach of contract would likewise constitute an unfair labor practice, while in *Teamsters Local 174* the state court held that the conduct found to constitute a breach of contract was neither protected nor prohibited activity under the federal Act, and the correctness of that ruling is challenged and is one of the issues before this Court. This distinction between the two cases appears to be without significance, however, as to whether the NLRB had exclusive primary jurisdiction, since the test the majority of this Court laid down in *Garmon* is whether the activity in question "is arguably subject" to the federal Act. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. Inasmuch as the activity involved in *Teamsters Local 174* appears to be at least "arguably subject" to the federal Act, the result in that case and the present should be the same, if the preemption doctrines laid down by this Court in *Garmon* and other cases are applicable at all to a suit for damages for breach of a collective bargaining agreement. To that extent the decisions of the Washington and Michigan Supreme Courts appear to be in conflict.

In any event a basic issue in both cases is whether the preemption doctrines heretofore articulated by this Court in equity actions and tort damage suits apply to suits for breach of collective bargaining agreements. This issue is

presented in this case isolated from the complicating factors which accompany it in *Teamsters Local 174*, so that review of this case would insure a clear-cut disposition of the issue.

This case also has inherent in it the issue which is before the Court in *Teamsters Local 174* v. *Lucas Flour Co.*, No. 716, and in *Charles Dowd Box Co.* v. *Courtney*, No. 641, with which it is set for argument. That issue is whether the jurisdiction conferred on the federal courts by Section 301 of the Taft-Hartley Act over suits for breach of collective bargaining agreements ousts state courts of jurisdiction over such suits. Resolution of that issue against state court jurisdiction would necessarily support the holding of the court below in the present case, even though the issue was not raised below.

2. The question whether the preemption doctrines heretofore laid down by this Court in equity actions and tort damage suits apply to suits for breach of collective bargaining agreements is an important issue which has not been, and should be, decided by the Court.

> "* * * there has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over acts constituting a contract violation as well as an unfair labor practice." Magruder, J., in *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F.2d 364, 367, 38 LRRM 2507, 2509 (1st Cir. 1956).

Alleged breaches of collective bargaining agreements give rise to several different categories of litigation, such as: (a) state court suits for damages for breach of contract; (b) state court actions for specific enforcement of the contract, including actions to compel arbitration or to enforce arbitration awards; (c) federal court suits under Section 301(a) of the Taft-Hartley Act for damages for breach of contract; and (d) federal court actions under Section 301

(a) for specific enforcement of the contract, including actions to compel arbitration or to enforce arbitration awards.

All of these types of litigation are likely to involve activity which "is arguably subject" to the National Labor Relations Act. This is particularly true of actions to compel arbitration or to enforce arbitration awards; there is, or up until now has been, a broad overlap between arbitration and the processes of the National Labor Relations Board, and numerous issues are regularly disposed of by arbitration which unquestionably fall also within the jurisdiction of the Board.

Far from holding that it has exclusive primary jurisdiction, the Board has welcomed the concurrent operation of the arbitration process. Thus, although the Board holds that it is not bound as a matter of law by an arbitration award, it will recognize and give effect to an award unless the award is at odds with the Act, or some other good reason appears for not recognizing it. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955). Further, in declining, in its discretion, to act on an unfair labor practice charge, the Board has taken into account the availability of an arbitral forum. *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1961). See Note, 69 Harv. L. Rev. 725, 734-736 (1956).

This doctrine of the Board accords with the policy of the Taft-Hartley Act, Section 203(d) of which provides:

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

Pursuant to that policy it has become a common practice to provide in collective bargaining agreements that the employer will not discriminate because of union member-

ship or activity, and to arbitrate disputes arising over the application of such clauses. The Labor Arbitration Report series, published by the Bureau of National Affairs (which starts in 1946 but reports only a small fraction of all arbitration awards), lists in the Index Digest some 75 cases under the topic, "Discharge and Discipline—Union Activities" (Sec. 118.664). Many other cases are found in Section 4—"Interference with Organization and Discrimination against Union Members." See Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52, 59-64 (1957).

Moreover, the Labor Board has itself refused to interpret collective bargaining agreements even where the interpretation involves an unfair labor practice. Section 8(d) of the Act makes it an unfair labor practice (i.e., a refusal to bargain) for either party to a collective bargaining agreement to "terminate or modify such contract" unless certain prescribed notices are given and waiting periods observed. However, when the question whether one party or the other has undertaken to "terminate or modify" the contract turns on the interpretation of the contract, the Board refuses to entertain the case. In dismissing a case of this sort the Board said, *United Telephone Company of the West*, 112 N.L.R.B. 779, 781 (1955):

> "The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. • • • Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act'."

The majority of courts have held that, when the same conduct may constitute both a breach of the collective bargaining agreement and an unfair labor practice, the aggrieved party has the option of an action to enforce the contract. In *Lodge No. 12, Machinists* v. *Cameron Iron Works, Inc.*, 257 F.2d 467, 473 (5th Cir. 1958), *cert. denied*, 358 U.S. 880, the court declared:

> "The distinguishing point is that, while an act may be both an arbitrable contract violation and an unfair labor practice, a 'breach of contract is not an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decision, the latter leaves decision discretionary."

In accord are: *United Steelworkers, Local 4264* v. *New Park Mining Co.*, 273 F.2d 352, 357-358, 45 LRRM 2158, 2161 (10th Cir. 1959); *Operating Engineers, Local 715* v. *Gulf Oil Corp.*, 262 F.2d 80, 43 LRRM 2301 (5th Cir. 1958); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401, 38 LRRM 2307 (3rd Cir. 1956); *Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529, 533-534, 29 LRRM 2264, 2267 (4th Cir. 1951); *Carey* v. *Westinghouse Electric Corp.*, 178 N.Y.S.2d 846, 42 LRRM 2685 (N.Y. Sup. Ct. 1958); *Aaronson Bros. Paper Corp.* v. *Fishko*, 144 N.Y.S.2d 643, 24 LA 862 (N.Y. Sup. Ct. 1955), *aff'd*, 286 App. Div. 1009. *Contra*, and in accord with the decision below, are: *Local 774, IAM* v. *Cessna Aircraft Co.*, 341 P.2d 989, 44 LRRM 2533 (Kan. Sup. Ct. 1959); and *Swope* v. *Emerson Electric Mfg. Co.*, 303 S.W.2d 35, 40 LRRM 2074 (Mo. Sup. Ct. 1957).

It is true that in most of these cases the action to enforce the contract took the form of an action to compel arbitra-

tion, though three involved damages for breach of contract, i.e., *United Steelworkers, Local 4264* v. *New Park Mining Co.*, (10th Cir., jurisdiction upheld); *Textile Workers* v. *Arista Mills Co.*, (4th Cir., jurisdiction upheld); and *Local 774, IAM* v. *Cessna Aircraft Co.*, (Kan. Sup. Ct., jurisdiction denied). Also, Judge Magruder has suggested that, "[w]ith respect to arbitrators, as distinguished from courts, a narrower position concerning the preemption doctrine is possible." *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F.2d 364, 367, 38 LRRM 2507, 2510 (1st Cir. 1956). And see Note, "Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice," 69 Harv. L. Rev. 725, 736-737 (1956). However, the courts which have passed upon the point have usually not drawn any such distinction, but have simply asserted that, when the same conduct may constitute both a breach of a collective bargaining agreement and an unfair labor practice, the aggrieved party has the option of proceeding in court on the contract. See, *e.g.*, *United Steelworkers, Local 4264* v. *New Park Mining Co.*, 273 F.2d 355, 357-358, 45 LRRM 2158, 2161 (10th Cir. 1959). The courts below in the present case did not suggest that a different result would have been reached had this proceeding been an action to compel arbitration instead of a suit for damages, though respondent argued that the two types of cases should be distinguished. In any event the matter is an important one which should be resolved by this Court.

It is also true that most of the decisions upholding court jurisdiction, where the breach of the collective bargaining agreement may also be an unfair labor practice, are federal decisions, with the weight of state authority apparently the other way. However, it is hard to see any distinction on

this point between federal and the state courts,[2] unless it is held that the jurisdiction conferred on the federal courts by Section 301 of the Taft-Hartley Act over suits for violation of collective bargaining agreements ousts state courts of jurisdiction over such suits. As noted, *supra*, p. 6, this latter issue is now before the Court in *Charles Dowd Box Co.* v. *Courtney*, No. 641, and is inherent in the present case, though not raised below.

CONCLUSION

For the reasons stated, it is respectfully urged that this petition for a writ of certiorari be granted, and that this case be set for argument together with Nos. 641 and 716.

Respectfully submitted,

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May 15, 1961

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[2] In *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 491, the Court declared:

> "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136 ff, 29 U.S.C. §§ 141 ff, are as follows:

• • • •

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"SEC. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the ap-

propriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (i) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

* * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *"

"FUNCTIONS OF THE SERVICE

"SEC. 203.

* * * *

"(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * * "

* * * *

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"SEC. 301. (a) Suits for violation of contracts be-

tween an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

STATE OF MICHIGAN

Circuit Court for the County of Wayne

DOYLE SMITH,

Plaintiff,

v.

EVENING NEWS ASSOCIATION,

a Michigan corporation,

Defendant.

OPINION ON MOTION OF DEFENDANT EVENING NEWS ASSOCIATION TO DISMISS FOR LACK OF JURISDICTION

(Filed February 1, 1960)

FACTS

Plaintiff, individually and as assignee of forty-nine others, brings this action in assumpsit claiming damages in the amount of $20,000.00 for breach of a collective bargaining agreement made between the defendant and Newspaper Guild of Detroit (herein called "the Guild").

Defendant is a Michigan corporation. It publishes a newspaper. The parties have agreed that it is engaged in interstate commerce.

Plaintiff and his assignors are all members of the Guild. They are also employees of defendant. Those members of the Guild who were employed by defendant were janitors, elevator operators and watchmen.

On December 1, 1955, and continuing until January 16, 1956, a group of employees of the defendant belonging to a union other than the Guild were on strike against defendant. Plaintiff claims that while the strike was in progress defendant permitted unorganized employees working in its editorial, business and advertising departments to report at defendant's premises and paid them their full wages. Plaintiff also claims he and those who assigned their claims to him (i.e., Guild members) were ready, able and available for work during the strike but only a few were allowed to enter the struck premises and to work with the result that they lost considerable money in wages. Plaintiff further claims the refusal to pay full wages to Guild members plus the payment of full wages to the unorganized employees constituted discrimination against Guild members because of their membership. This he says was not only a discrimination but it is also a breach of the following convenant in the contract between the Guild and the defendant:

> "There shall be no discrimination against any employee because of his membership or activity in the Guild."

Defendant denies discrimination and partiality. It says that employees were retained in accordance with the need for their services and not with reference to any membership in the Guild or any other organization; that certain aspects of the business had to be carried on at full strength and in fact at more than usual strength by reason of the strike and in spite of it; that news had to be gathered and preserved; that money had to be received and disbursed; that advertising contracts had to be serviced and that some of these activities were even increased by the strike rather than diminished.

This Court, if it proceeded to a trial on the merits, would be required to determine whether or not plaintiff and his assignees were discriminated against, by reason of their

Guild membership, when defendant employed on a full-time basis and paid its unorganized employees but did not do the same for all those employees who were Guild members. Such discrimination, if found to exist, would constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act, as amended (herein called "the Act").

Plaintiff, and each of his assignees, failed to file a charge with the National Labor Relations Board within the six-month period contemplated in the Act. Had a charge been filed and a complaint been issued under the Act, the Board would have had the right on proper findings—not only to reinstate but also to award back pay. (Section 10(c)). However, since plaintiff and his assignees failed to file a charge no complaint can now be issued under the Act. (Section 10(b) of the Act.) Instead of filing a charge, in October of 1956—more than six months after the conclusion of the strike and the events above mentioned—plaintiff commenced this suit at law.

Defendant plead that the Court has no jurisdiction over the subject matter of the suit. This defense was based upon the claim that the subject had been preempted by the Labor-Management Relations Act, 1947, as amended (i.e., the Act). At the opening of the trial, defendant moved to dismiss for lack of jurisdiction on the following grounds:

> 1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and
>
> 2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter.

The issue this Court is now called upon to decide, by reason of defendant's defense and motion, can be stated as follows:

> Does a state court have jurisdiction of an action at law by an employee against his employer for breach of

contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true constitute both a breach of such contract and also an unfair labor practice under the provisions of Section 8(a) of the Act?

OPINION

Plaintiffs have charged defendant with committing what constitutes a statutory unfair labor practice of discriminating against them by reason of their union membership. This is an area which the federal government has preempted and placed in the exclusive control of the National Labor Relations Board.

More than twelve years ago, before the United States Supreme Court had considered the subject, the Circuit Court of Appeals for the 4th Circuit, in *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, concluded that recompense of lost wages on account of an unfair labor practice is a matter for the labor board.

Plaintiff in this case is attempting to circumvent the exclusive remedy afforded him in the Act by declaring on the contract. It seems that he should be unable to succeed. The case of *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L. Ed. 228 (1953), held that the National Labor Relations Board has exclusive jurisdiction of unfair labor practices. In that case the plaintiff had 24 employees, four of whom were members of defendant union. Defendant engaged in what was an unfair labor practice under the Act. It placed pickets, none of whom were employees of plaintiff, at plaintiff's loading platform to induce and coerce plaintiff's employees to join the union. Drivers from other unions refused to cross the picket line, as a result of which plaintiff's business fell off as much as 95 per cent. The Supreme Court of the United States stated that this was a matter for the National Labor Relations Board, not for the state courts.

and that the need for uniformity in applying the Act necessitated centralized administration in one body. Thus the state and federal courts are preempted from deciding unfair labor practices. The Court also discussed the importance of public and private rights, saying at page 500:

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

See also *Grimes & Hauer, Inc.* v. *Pollack, et al.*, 127 N.E. 203 (1955) holding, among other things, that both public and private rights are comprehended in the Act. The *Garner* case has been followed extensively and is considered to be the leading case on the preemption doctrine as it applies to unfair labor practices.

Weber, et al. v. *Anheuser-Busch, Inc.*, 384 U.S. 468, 99 L. Ed. 546 (1955) affirmed the *Garner* case. In that case the union struck and picketed an employer's plant to compel the employer to insert into a contemplated collective bargaining contract a clause obligating the employer to employ, for repair or replacement of machinery, only contractors who had collective bargaining agreements with that union. Employer filed charges of unfair labor practices under Section 8(b), (4), (D) of the Act. The National Labor Relations Board quashed notice of the hearing, holding that no "dispute" existed within the meaning of that subsection. Before the Board acted, the employer sought an injunction against the union in a Missouri state court alleging a secondary boycott and also a violation of Subsections (A), (B) and (D) of 8(b) (4) of the Act. A permanent injunction was

issued by the State Court after the Board found no violation of Section 8(b), (4), (D). Upon certiorari to the Supreme Court of the United States, that Court said in part:

> "A state may not enjoy, under its own labor statute, conduct which has been made an 'unfair labor practice' under the federal statutes. Such was the holding in the Garner case (U.S.), *supra*. The Court pointed out that exclusive jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board."

Then, after finding that the Board had not ruled that no unfair labor practice was involved but only that there was no violation of subsection (D) of Section 8(b), (4), the Court said, at page 479:

> "Respondent itself alleged that the union conduct it was seeking to stop came within the prohibitions of the federal act, and yet it disregarded the Board and obtained relief from a State Court. It is perfectly clear that had respondent gone first to a Federal Court, instead of the State Court, the Federal Court would have declined jurisdiction, at least as to the unfair labor practices on the ground that exclusive primary jurisdiction was in the Board. As pointed out in the Garner case, the same considerations apply to the State Courts."

And, at page 481:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that Act, the State Court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

In harmony with these decisions, certain other cases should specifically be mentioned. The case of *Swope* v.

Emerson Electric Mfg. Co., 303 S.W.2d 35 (1957) (Certiorari denied in 355 U.S. 894), was an action to recover damages upon the theory that the employer and others had conspired to discharge plaintiffs because of union activities and in breach of their employment contract. The gist of the plaintiff's allegations was a charge of an unfair labor practice (i.e., a discrimination on account of union activities) and the damages sought were the loss of wages. The Court pointed out that with few exceptions—such as common law torts accompanied by violence—the clear import of the federal cases now is that state courts may not exercise jurisdiction as to those matters constituting unfair labor practices under the federal act. The Court held that exclusive jurisdiction was vested in the National Labor Relations Board and dismissed the case.

In *United Electrical, Radio and Machine Workers of America, et al.* v. *General Electric Co.*, D.D. 231 F.2d 259 (1956), a union and one of its members sought injunctive relief and damages for breach of contract due to the discharge of plaintiff because he had invoked the Fifth Amendment, which is in effect saying the Company committed an unfair labor practice. The Court followed the *Garner* decision, dismissing for lack of jurisdiction, and again made it clear that jurisdiction is vested in the National Labor Relations Board. The Court also said, at page 261, footnote 1:

> "The circumstance that the facts alleged in the present complaint, constituting an unfair labor practice, are in the nature of a breach of contract and not, like the facts in the Garner case, in the nature of a tort, would not authorize the District Court or this court to create an exception to the Garner rule and assert jurisdiction before the Board has been asked to exercise it."

The doctrines of these cases seem to have been followed almost without exception and have left little doubt as to the

exclusive nature of federal (as distinguished from state) jurisdiction over unfair labor practices. See also *Bert Mfg. Co.* v. *Local 810*, 136 N.Y.S.2d 805 (1954); *Bearden* v. *Coker*, 291 S.W.2d 790 (1956); *Leiter Mfg. Co.* v. *International Ladies Garment Workers Union, AFL*, 269 S.W.2d 409 (1954); *T&C Motors* v. *Local Union No. 328*, 355 Mich. 26; *Davidson* v. *Carpenters Council*, 356 Mich. 557; *Guss* v. *Utah*, 353 U.S. 1; *Amalgamated* v. *Fairlawn*, 353 U.S. 20; *San Diego* v. *Gormon*, 353 U.S. 26. See also the recent case of Grand Lodge v. *Cessna*, 341 Pac. 2d 989, in which an injunction was sought in the Kansas court to enjoin the violation of a collective bargaining contract expressly prohibiting "discrimination—for engaging in—union activity" and in which case the Court, in dismissing the complaint for lack of jurisdiction over the subject matter, because of preemption, reviewed the decisions and said: *"that a plaintiff may not characterize an action which constitutes an unfair labor practice as a 'contract violation' and thereby circumvent the plain mandate of Congress that jurisdiction of such matters be vested exclusively in the National Labor Relations Board."*

If the case at bar involved merely a breach of contract, without an unfair labor practice, and was instituted by the union in a federal district court, then a suit could be successfully prosecuted from a jurisdictional standpoint, at least in a federal court. (See *UAW, Local 286* v. *Wilson Athletic Goods Mfg. Co., Inc.* (N.D.), 119 F. Supp 948 (1950). Such, however, is not the case here. Plaintiff is suing as an individual, in a state court, for breach of contract involving an unfair labor practice, and is seeking back wages, a remedy which the National Labor Relations Board is empowered to grant under Section 10(c).

The only apparent exceptions to the presently strict preemption doctrine seem to arise in cases involving violent

torts and in cases where an employee is suing the union for reinstatement. Courts allow suits in the state courts in three tortious situations: (1) Mass picketing; (2) Violence; (3) Overt threats of violence. The reason given in these cases is that it is necessary, under the state police power, to preserve the peace, safety, etc., of the state. If parties were required to wait until the National Labor Relations Board found an unfair labor practice before issuing its order, the violence, intimidation, etc., would mushroom entirely uncontrolled. Thus an exception has been made in cases where violence is involved. See *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 98 L. Ed. 1025 (1954); *United Automobile, Aircraft and Agricultural Implement Workers* v. *Wisconsin Employment Relations Board*, 351 U.S. 266 (1956); *Johnston, et al* v. *Colonial Provision Co., Inc.* (Mass.), 128 F. Supp. 954 (1954), and *UAW* v. *Russell*, 356 U.S. 634.

Counsel for plaintiff seems to rely heavily upon the *Russell* case as standing for the proposition that a state court has jurisdiction of an action by an employee against an employer for breach of a collective bargaining contract which also involves an unfair labor practice. The *Russell* case is merely another example of a situation involving violence. In this case the plaintiff was forcibly prevented from crossing a picket line. Plaintiff brought an action for the tort of wrongful interference with a lawful occupation. The Court carefully confined its opinion to situations involving violence, threats thereof, or mass picketing and referred to the *Laburnum* case.

The second exception arises in cases where a union member sues his union for restoration of his membership and or damages due to illegal expulsion. In *Real* v. *Curran*, 138 N.Y.S. 2d 869 (1955), the plaintiff sued the union in a state court for reinstatement and for a declaration that his

expulsion was void. His expulsion was due to a conviction of a narcotics charge fifteen years prior to his union membership. The Court held that although the National Labor Relations Board must determine the question of an unfair labor practice, state courts are not precluded from restoring membership to a wrongfully expelled member of the union. In *I.A.M.* v. *Gonzales*, 42 LRRM 2135, 356 U. S. 617 (1958), the second case on which counsel for the plaintiff so heavily relies, the state court allowed a suit by an expelled union member against his union for restoration of his membership and for damages due to his illegal expulsion. Again the Court specifically limited its decision to this type of factual situation and to suits between a union and one of its members. Mr. Justice Frankfurter took pains to point out that this was not a suit to remedy employer discrimination. He said, at page 2137:

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at is an unfair labor practice under Section 8(b)(2). * * * A state court decision requiring restoration of membership requires consideration of a judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership."

The above mentioned cases are the only apparent exceptions to the strict preemption doctrine as it is applied to unfair labor practices. The case at bar falls into neither category.

Plaintiff cites several other cases which, upon analysis, are found to be quite different from and not controlling of the issues involved in, the case at bar. For example, the following, most of which also arose prior to the teachings in the United States Supreme Court cases of *Garner* and *Weber, et al., supra:*

(1) *Textile Workers Union* v. *Arista Mills*, 193 F.2d 529 (CCA, 4th Cir. 1951). This was an action under Section 301(a) of the Act involving a dispute between *a union and an employer in a federal court*. The suit was for breach of a collective bargaining agreement. The relief asked was declaratory judgment, an injunction and damages. The dispute involved *reinstatement and seniority provisions* of a contract. The Court held for the union but not on jurisdictional grounds, saying, at page 533:

> "We do not mean to say that merely because a bargaining contract may forbid unfair labor practices, courts have jurisdiction to afford relief against them under the guise of relieving against breaches of contract * * *"
>
> "We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the N.L.R.B. Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute an unfair labor practice within the meaning of this act."

In this case there was also a complaint filed with the National Labor Relations Board, a procedure absent, and vitally so, in the case at bar. This case was decided before the *Garner* case and without benefit of that opinion.

(2) *Reed* v. *Farwick*, D. C., 86 F. Supp. 822 (1949), also decided before the *Garner* case and also a suit in a federal court under Section 301(a) of the Act. In this case the individual plaintiffs were dropped as parties by agreement because of Section 301(a), thus meeting the requirements of that section. This case was a suit charging an unfair labor practice of refusing to bargain collectively and the act of

encouraging the organization of rival unions on the premises. The Court separated the unfair labor practice from the contract portion and took jurisdiction of the latter while declining to do so in reference to the unfair labor practice charge.

(3) *Modine Mfg. Co.* v. *I.A.M.*, 217 F.2d 326 (CCA 6th Circuit, 1954). Again a suit in a federal court under Section 301(a) by a labor union against an employer.

(4) *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45. This too is a suit between an employer and a union in the federal court under Section 301(a) of the Act.

(5) *United Telephone Co. of the West and United Utilities*, 112 NLRB 779. This case is a Board decision and it did not deal with a preemption problem.

By failing to invoke the proper procedure of filing a charge with the National Labor Relations Board within the six-month statutory period, by charging facts which are both an unfair labor practice as well as a contract violation, and by bringing this action in a state court, plaintiff is precluded from recovery in the instant case. The National Labor Relations Board had the power to award back pay even if there is no discharge and reinstatement problem. See Sec. 10(c). Furthermore, no specialized damages have been asked which the National Labor Relations Board would have been powerless to give. The need for uniformity in applying the provisions of the labor-Management Relations Act still prevails over the argument that state courts should entertain suits in situations of the type present in this case. The facts, as presented, do not require immediate action as is so often the case where violent torts have been threatened or committed. Finally, in order to allow recovery on the contract, this Court would be required to find discrimination of a kind which would also be an unfair labor

practice and thus subject to correction by the National Labor Relations Board.

In view of the cases cited in this opinion, defendant's motion to dismiss for lack of jurisdiction should be granted. An order may be entered consistent with the opinion.

MILES N. CULEHAN,
Circuit Judge.

ORDER OF DISMISSAL

(Filed February 11, 1960)

At a session of said Court, held in the City-County Building, City of Detroit, Wayne County, Michigan, this 11th day of February, A.D. 1960.

Present: Honorable Miles N. Culehan, Circuit Judge.

This Court, having considered the oral arguments in open court and the written briefs submitted by counsel for both parties on defendant's Motion to Dismiss, and having concluded that this Court lacks jurisdiction;

Now, Therefore, It Is Ordered that this cause be and the same hereby is dismissed.

MILES N. CULEHAN,
Circuit Judge.

STATE OF MICHIGAN

Supreme Court

DOYLE SMITH,

Plaintiff and Appellant.

v.

EVENING NEWS ASSOCIATION,
a Michigan corporation,
Defendant and Appellee.

BEFORE THE ENTIRE COURT
KAVANAGH, J.

Plaintiff and his assignors are employees of defendant Evening News Association and are members of a labor organization, the Newspaper Guild of Detroit. The Guild had a collective bargaining agreement with defendant which provided, among other things:

"There shall be no discrimination against any employee because of his membership or activity in the Guild." A group of employees of defendant belonging to a union other than the Guild went on strike. Defendant permitted employees of the editorial department, business office and advertising department, who were not covered by a collective bargaining agreement, to report on the premises and they were paid full wages even though there was no work available.

Plaintiff and his assignors were willing to work but defendant permitted only a few to work and as a result, plaintiff and his assignors lost considerable money in wages.

Plaintiff contends that defendant's refusal to pay full wages to plaintiff and his assignors and defendant's payment of full wages to other employees constituted dis-

crimination against an employee because of his membership or activity in the Guild and, therefore, was a violation of the contract provision above quoted.

Plaintiff brought this action in the circuit court for the county of Wayne to recover damages for such breach.

Defendant moved to dismiss for lack of jurisdiction on the following grounds:

"1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and

"2. The National Labor Relations Board has been vested by virtue of such amended act with exclusive jurisdiction of the subject matter."

The trial judge granted the motion to dismiss for lack of jurisdiction on the theory that Congress in adopting the National Labor Relations Act had pre-empted the field and placed the question of a statutory unfair labor practice exclusively within the control and jurisdiction of the National Labor Relations Board.

Plaintiff appeals, and we are presented with the following question:

Does a State court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the National Labor Relations Act as amended?

For the purpose of the decision on this particular motion to dismiss it was stipulated that defendant was engaged in commerce within the meaning of the National Labor Rela-

tions Act as amended. It should be further noted that plaintiff failed to bring a complaint to the Board under the unfair labor practices provisions of the National Labor Relations Act until after the expiration of the statutory period provided for the bringing of such complaint.

Plaintiff argues that under the decisions of the United States supreme court Congress has not pre-empted the entire labor field. He contends there are numerous exceptions to the rule. He argues that the case of *Garner* v. *Teamsters Union*, 346 U.S. 485, stands only for the proposition that peaceful picketing of the premises of an employer engaged in commerce may not be enjoined by a State court. He points out as an exception to the general rule that in the case of *United Workers* v. *Laburnum Corp.*, 347 U.S. 656, where plaintiff sought damages in a State court from a union for engaging in coercive conduct, which conduct was also an unfair labor practice, the United States supreme court affirmed the right of plaintiff to damages against the union on the theory that Congress, in the National Labor Relations Act, had not provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. Plaintiff refers to the case of *United Automobile Workers* v. *Russell*, 356 U.S. 634, where the United States supreme court did not deprive the Alabama State court of jurisdiction where it had allowed an employee to recover damages from a union even where the union's conduct constituted an unfair labor practice and the National Labor Relations Board had jurisdiction to award back pay to the employee. Plaintiff calls particular attention to the fact that in the Russell Case the court indicated there are cases in which there is a possibility that both the Board and the State court have jurisdiction to award lost pay.

Plaintiff contends this is simply an action for damages

for breach of contract. He claims State courts have traditional and statutory jurisdiction to grant such relief.

Defendant, on the other hand, relying upon almost the same cases, contends that they hold that preemption exists limiting the jurisdiction of State courts in an action for damages for breach of contract when such action also constitutes an unfair labor practice.

Section 8(a) of the National Labor Relations Act provides in part as follows:

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 • • • (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization • • •."

Section 10(c) of the act provides in part as follows:

> "If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act • • •."

Whether plaintiff can maintain his action in the State court is entirely dependent upon whether Congress preempted the field as to this kind of action and vested exclusive jurisdiction in the National Labor Relations Board. This is, to say the least, a difficult question.

The United States supreme court itself has found difficulty in reconciling the effect and meaning of its decisions on this field of law. It seems we must start with the general premise that Congress has pre-empted the field in

labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in the National Labor Relations Board to determine such labor disputes where labor practices are either prohibited or protected by the Labor Management Relations Act.

In determining whether this is always true we turn to the latest available position on this subject—the discussion in San Diego Building Trades Council v. Garmon, 359 US 236. There, the respondents, copartners in the business of selling lumber in California, began an action in the superior court for the county of San Diego asking for an injunction and damages. The unions sought from respondents an agreement to retain in their employ only those workers who were already members of the union or who applied for membership within 30 days. Respondents refused until one of the unions had been designated as the collective bargaining agent. The unions began at once peacefully picketing respondents' place of business and exerting presure on customers and suppliers in order to persuade them to stop dealing with respondents. The trial court found that the sole purpose of these pressures was to compel execution of the proposed contract. The unions protested this finding, claiming the purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement. The court also awarded $1,000 damages for losses found to have been sustained. The United States supreme court granted certiorari and decided the matter along with Guss v. Utah Labor Relations Board, 353 US 1, and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 US 20, holding that the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating. In vacating and remanding

the judgment of the California court (353 US 26) the United States supreme court pointed out that the Guss and Fairlawn cases involved relief of an equitable nature and controlled the injunctive question, but remanded to the State court the question of whether the judgment for damages would be sustained under California law. On remand, the State court sustained the award of damages. The California court relied on general tort provisions of the California an unfair labor practice under State law. In so holding, the count relied on general tort provisions of the California civil code as well as State enactments dealing specifically with labor relations. The United States supreme court again granted certiorari. Justice Frankfurter delivered the opinion of the Court. After pointing out the difficult situation presented to that court in construing the National Labor Relations Act, he said (p 240):

> "This court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent by the judicial process."

He then discussed all the earlier cases on this subject and concluded by saying (pp 244-246):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8 due regard for the federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct so placed within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically di-

rected towards the governance of industrial relations.[3] Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

"At times it has not been clear whether the particular activity regulated by the States was governed by section 7 or section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this court's authority cannot remain within a State's power and State jurisdiction too must yield to the exclusive primary competence of the board. See, e.g., *Garner* v. *Teamsters Union*, 346 US 485, especially at 489-491; *Weber* v. *Anheuser-Busch, Inc.*, 348 US 468.

"The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the

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[3] See *Weber* v. *Anheuser-Busch, Inc.*, 348 US 468, in which it was pointed out that the State court had relied on a general restraint of trade statute. Cf. *Auto Workers* v. *Wisconsin Board*, 351 US 266. The case before us involves both tort law of general application and specialized labor relations statutes.

Board decides, subject to appropriate federal judicial review, that conduct is protected by section 7, or prohibited by section 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States.[4] However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the general counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this court to decide whether such activities are subject to State jurisdiction. The withdrawal of this narrow area from possible State activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

"In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State

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"[4] See *Auto Workers v. Wisconsin Board*, 336 US 245. The approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.

"[5] When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . .' *Charleston & West Carolina R. Co. v. Varnville Furniture Co.*, 237 US 597, 604."

of California seeks to give a remedy in damages, and since such activity is arguably within the compass of section 7 or section 8 of the act, the State's jurisdiction is displaced.

Justice Frankfurter went on to say (pp 247-248):

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 US 634; *United Construction Workers* v. *Laburnum Corp.*, 347 US 656. We have also allowed the States to enjoin such conduct. *Youngdahl* v. *Rainfair*, 355 US 131; *Auto Workers* v. *Wisconsin Board*, 351 US 266. State jurisdiction has prevailed in these situations because the compelling State interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers* v *Laburnum Corp.*, 347 US 656, found support in the fact that the State remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e., 'intimidation and threats of violence.'"

Justice Harlan, writing a concurring opinion in the same case, in discussing the majority opinion said (pp 250-254):

"The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all State power. *Hill* v. *Florida*, 325 US 538; *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Motor Coach Employees* v. *Wisconsin Board*, 340 US 383. That threshold question was squarely faced in the *Russell* case, where the court, at page 640, said: 'At the outset, we note that the union's activity in this case clearly was not protected by federal law.' The same question was, in my view, necessarily faced in *Laburnum*.

"In both cases it was possible to decide that question without prior reference to the National Labor Relations Board because the union conduct involved was violent, and as such was of course not protected by the federal act. Thus in *Laburnum*, the pre-emption issue was limited to the 'type of conduct' before the court. 347 US, at 658. Similarly in *Russell*, which was decided on *Laburnum* principles, the court stated that the union's activity 'clearly was not protected,' and immediately went on to say (citing prior 'violence cases'[1]) that 'the strike was conducted in such a manner that it could have been enjoined' by the State. 356 US, at 640. In both instances the court, in reliance on former 'violence' cases involving injunctions,[2] might have gone on to hold, as the court now in effect says it did, that the State police power was not displaced by the federal act, and thus disposed of the cases on the ground that State damage awards like State injunctions, based on violent conduct did not conflict with the federal statute. The court did not do this, however.

"Instead the relevance of violence was manifestly deemed confined to rendering the *Laburnum* and *Russell* activities federally unprotected. So rendered, they could then only have been classified as prohibited or 'neither protected nor prohibited.' If the latter, state jurisdiction was beyond challenge. *Automobile Workers* v. *Wisconsin Board*, 336 US 245. Conversely, if the activities could have been considered prohibited, primary decision by the board would have been necessary, if State damage awards were inconsistent with federal prohibitions. *Garner* v. *Teamsters Union*, 346 US 485. To determine the need for initial reference to the board, the court assumed that the activities were unfair labor practices prohibited by the federal act. *Laburnum, supra*, at 660-663; *Russell, supra*, at 641. It then considered the possibility of conflict and held that the State damage remedies were not pre-empted because the federal act afforded no remedy at all for the past conduct involved in *Laburnum*, and less than full

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"[1] *Youngdahl* v. *Rainfair, Inc.*, 355 US 131; *Automobile Workers* v. *Wisconsin Board*, 351 US 266.

"[2] See *Allen-Bradley Local* v. *Wisconsin Board*, 315 US 740.

redress for that involved in *Russell*. The essence of the court's holding, which made resort to primary jurisdiction unnecessary, is contained in the following passage from the opinion in *Laburnum*, *supra*, at 665 (also quoted in *Russell*, *supra*, at 644):

> "'To the extent that congress prescribed preventive procedure against unfair labor practices, that case [*Garner* v. *Teamster Union*, *supra*,] recognized that the act excluded conflicting State procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between State and federal administrative remedies in that case was itself, a recognition that if no conflict had existed, the State procedure would have survived.'

"Until today this holding of *Laburnum* has been recognized by subsequent cases. See *Weber* v. *Anheuser-Busch Inc.*, 348 US 468, 477; *Automobile Workers* v. *Russell*, *supra*, at 640, 641, 644; *International Assn. of Machinists* v. *Gonzales*, 356 US 617, 621, similarly characterizing *Russell*; see also the dissenting opinion in *Gonzales*, especially at 624-626.[4]

"The court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable board delays, may

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"[4] The same view is taken of *Laburnum* and *Russell* in the *amici* briefs filed in the present case by the government and the American Federation of Labor and Congress of Industrial Organizations, the latter stating that '[w]e hope to argue in an appropriate case that the *Russell* decision should be overruled.'

render State redress ineffective. And in instances in which the board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the board, as we observed in *Russell*, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the board does accept jurisdiction.

"I am, further, at loss to understand, and can find no basis on principle or in past decisions for, the court's intimation that the States may even be powerless to act when the underlying activities are clearly 'neither protected nor prohibited' by the federal act. Surely that suggestion is foreclosed by *Automobile Workers* v. *Wisconsin Board*, 336 US, *supra*,[5] as well as by the approach taken to federal pre-emption in such cases as *Allen-Bradley Local* v. *Wisconsin Board*, supra, *Bethlemen Steel Co.* v. *New York Board*, 330 US 767, 773, and *Algoma Plywood Co.* v. *Wisconsin Board*, 336 US 301; not to mention *Laburnum* and *Russell* and the primary jurisdiction doctrine itself.[6] Should what the court now intimates ever come to pass, then indeed State power to redress wrongful acts in the labor field will be reduced to the vanishing point.

"In determining pre-emption in any given labor case, I would adhere to the *Laburnum* and *Russell* distinction

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"[5] The court may be correct in stating that 'the approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no preemption when the conduct charged is in fact neither protected nor prohibited. To the contrary; that holding has remained fully intact, and, as already noted, underlay the decisions in *Laburnum* and *Russell*.

"[6] If the 'neither protected nor prohibited' category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see *International Assn. of Machinists* v. *Gonzales*, 356 US 617."

between damages and injunctions and to the principle that State power is not precluded where the challenged conduct is neither protected nor prohibited under the federal act. Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision.

There can be no question from the concurring opinion of Justice Harlan that he believed the majority opinion had limited the State power to redress wrongful acts in the labor field to the vanishing point, whether the acts were federally prohibited or federally protected. It is equally evident that Justice Harlan and those who concurred in his opinion believed that, where it is fairly debatable whether the conduct involved is federally protected, Congress has pre-empted the field so as to prevent State action.

The question in the instant case, then, is whether the alleged discrimination on the part of defendant-appellee would constitute an unfair labor practice under the National Labor Relations Act, particularly under sections 7 or 8 thereof. It is agreed for the purpose of this case that the action alleged as constituting a breach of contract would also constitute an unfair labor practice. Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress—that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair labor practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and thereby circumvent the plain mandate of Congress.

In the instant case the damages would appear to be the

loss of wages. The National Labor Relations Board under section 10(c) of the act has adequate authority to adjust the wrong by requiring the payment of back wages.

Since it is, to say the least, fairly debatable whether the conduct here involved is federally protected, then under both the majority and concurring opinions of *Garmon*, the judgment of the trial court must be affirmed. Defendant shall have costs.

Stamped filed: Jan. 9, 1961
Donald F. Winters,
Clerk Supreme Court.

Signed: Thomas M. Kavanagh
Eugene F. Black
Harry F. Kelly
John R. Dethmers
Leland W. Carr
Talbot Smith
George Edwards
Theodore Souris

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of January in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable

John R. Dethmers,
Chief Justice
Leland W. Carr,
Harry F. Kelly,
Talbot Smith
Eugene F. Black,
George Edwards,
Thomas M. Kavanagh,
Theodore Souris,
Associate Justices.

Doyle Smith,

Plaintiff and Appellant,

vs 48675

Evening News Association,

Defendant.

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiff its costs, to be taxed, and that it have execution therefor.

NO. [redacted] 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 1962

DOYLE SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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June 8, 1961

THE INLAND PRESS, DETROIT, MICHIGAN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 961

DOYLE SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

The Petition for a Writ of Certiorari and the decision of the lower court in this case present no issues warranting review by this Court. There is neither conflict between the Michigan court's decision and those of the Massachusetts and Washington courts referred to and relied upon by petitioner, nor with the decisions of this Court. Had the Michigan court decided this case other than as it did, it's decision would have been in direct conflict with prior decisions of this Court.

STATUTES INVOLVED

The statutory provisions involved are Section 8(a)(3) of the National Labor Relations Act, as amended, (sometimes hereinafter referred to as "the Act") 61 Stat. 140, 29 U.S.C. 158, the pertinent part of which provision is printed in Appendix A to the Petition, p. 12, and Section 10(c) of the Act, 61 Stat. 146; 29 U.S.C. 160, the pertinent part of which reads as follows:

> "* * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter * * *".

QUESTION PRESENTED

Does a state court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon conduct which, if proven constitutes both a breach of such contract and an unfair labor practice under the provisions of section 8(a)(3) of the National Labor Relations Act?

STATEMENT

This was an action by petitioner, an employee of the respondent, on his own behalf and as assignee of other employees in a state court of general jurisdiction for breach

of a contract between respondent and a Union representing petitioner and others. The second amended declaration (2a)[1] sought to recover as damages back pay which the petitioner claimed to be entitled to. The contract provision allegedly breached was copied, virtually verbatim, from Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158. The contract provision was as follows (4a):

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild".

Petitioner claimed that he and his assignors had been discriminated against by respondent's failure to employ them during the course of a strike at respondent's plant, while non-union employees were employed. It was conceded that this alleged activity constituted an unfair labor practice within the meaning of Section 8(a)(3) of the Act, and that petitioner and his assignors could have filed a charge with the National Labor Relations Board charging such an unfair labor practice. No such charge was ever filed, and this suit was commenced after the six (6) months period of limitations provided by the Act had expired, Section 10(b) of the Act, 29 U.S.C. 160. No contract provision other than that quoted above was involved. Petitioner did not seek to base jurisdiction on Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 185, nor did respondent base its motion to dismiss on that section of the Act. The suit simply asserted petitioner's common law right to recover back pay by way of damages for breach of

[1] References followed by the letter "a" are to the printed Appellant's Appendix which is part of the record certified by the Clerk of the Supreme Court of Michigan.

contract. The suit did not involve or seek to enforce arbitration. As stated in the petition the respondent's motion to dismiss for lack of jurisdiction was granted, and this ruling was affirmed on appeal to the Michigan Supreme Court.

REASONS FOR DENYING THE WRIT

The state court, in determining whether respondent's conduct constituted discrimination because of union membership, at trial would of necessity have had to consider the same question as would the National Labor Relations Board had a complaint been issued. The remedies afforded by the state court and the Board would have been parallel. Petitioner in the state court proceedings sought as damages the same relief he could have secured from the Board, i.e., back pay. Section 10(c) of the Act, 29 U.S.C. 160. The only argument advanced to avoid the plain language of this Court's pre-emption cases, is that this separate and independent jurisdiction is justified because the unfair labor practice charged also constituted a breach of contract.

It cannot be sufficiently emphasized that this argument would vest independent jurisdiction in a state court based on its own common law to determine whether activity, not merely "arguably subject" but concededly subject to Section 8(a) (3) of the National Labor Relations Act, constitutes a breach of contract. In awarding damages (based on back pay) the state court would be effectively regulating an area of conduct which is the primary and exclusive concern of the National Labor Relations Board. *San Diego Unions v. Garmon*, 359 U.S. 236, 247. If such jurisdiction is recognized the potentiality, indeed probability, of conflict is too obvious to warrant discussion.

The reasons advanced by petitioner for granting review relate for the most part to issues not present in this case. Thus, petitioner cites cases involving arbitration pursuant to contract where an unfair labor practice might also have been involved. No such issue is present here. Whatever may be said for the solution of industrial problems by means of arbitration is irrelevant to the question whether a state court should be permitted to impose on the parties its own ideas of what constitutes an unfair labor practice under the guise of an alleged breach of contract action.

Similarly, the federal decisions discussed by petitioner involved suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Questions arising under this Section, which is an amendment to the very Act from which the National Labor Relations Board derives its authority, are not present, inherently or otherwise, in this action. This is not an action where jurisdiction is, or could be, premised on Section 301 of the Act. Such jurisdiction is not claimed in petitioner's declaration, nor raised by respondent's motion to dismiss. This is simply a suit to enforce a contract having its claimed genesis in the common law of the State of Michigan, enforcement of which has no necessary connection with the existence of a controversy arising under Section 301. Accordingly, no federal question relative to the construction of Section 301 and its grant of jurisdiction is or can be raised by this appeal. *Gully v. First National Bank*, 299 U.S. 109. Moreover, this is a suit by individual employees for back pay, not by the union to enforce the collective bargaining agreement. Section 301 cannot be invoked in any event under such circumstances. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437. Any claim that this case is similar to

or in conflict with, *Charles Dowd Box Co. v. Courtney*, No. 641, certiorari granted February 20, 1961, is therefore without merit. That case is concededly a Section 301 type proceeding which could have been brought in a federal district court. Respondent in that case likewise concedes that the Massachusetts court, if its jurisdiction is sustained, would be required to apply federal substantive law pursuant to *Textile Worker's Union v. Lincoln Mills*, 353 U.S. 448. No unfair labor practice was there involved.

Teamsters Local 174 v. Lucas Flour Co., No. 716, certiorari granted April 3, 1961, raises issues not present in this case. The major issue is whether or not the conduct there involved was protected or prohibited. This case presents no such issue as the alleged conduct is concededly prohibited. *Local 174* does not involve an unfair labor practice, as does this, but a claim by the union that its right to strike was protected. The plaintiff in that case had no parallel remedy before the National Labor Relations Board. The only possible ground for assimilating that case with this is the broad conclusion by the Washington court, despite the lack of a no-strike clause, that it could award damages on the theory of breach of contract, it having been decided that the union's activity was neither protected nor prohibited.

The decision of the Michigan court is consistent with and properly applies principles announced in prior decisions of this Court, particularly as explained and interpreted in the last case before the Court, *San Diego Unions v. Garmon*, 359 U.S. 236, upon which the Michigan court principally relied. As *Garmon* indicates, state court jurisdiction exists only in those cases where there is (359 U.S. 247):

> "* * * conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell*, 356 U.S. 634; *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 * * State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. * * *"

No "violence and imminent threats to the public order" are present in this case.

Nor is there any question in this case but that a claimed unfair labor practice is involved. It is not only conceded but petitioner would have had to prove that it was committed in order to recover in the state court. This is no case such as *International Association of Machinists v. Gonzales*, 356 U.S. 617, where, as the Court said in *Garner*, 350 U.S. 243):

> "* * * the activity regulated was a *merely peripheral concern* of the Labor Management Relations Act." (Emphasis Ours)

The unfair labor practice claimed in this case is discrimination against employees on account of their union membership, a matter with which the Board has been *directly concerned* since the original National Labor Relations Act.

It should also be noted in connection with *Garner*, that the question which concerned those joining in the Concurring Opinion in that case (350 U.S. 249 et seq.) is not present in this case. Although no protected activity is here involved, and the respondent's alleged conduct is concededly pro-

hibited, petitioner and his assignors had a parallel remedy before the National Labor Relations Board, unlike *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 where the federal Act afforded no remedy at all, and *Automobile Workers v. Russell*, 356 U.S. 634 where the federal Act afforded less than full redress.

Lastly, the only claimed difference, which Petitioner points to, between this and other pre-emption cases is that Michigan can undertake to regulate the activities here involved on the theory of a breach of contract. All past decisions of this Court have ignored the asserted grounds on which the state court sought to intervene, be it common-law tort (*United Mine Workers v. Laburnum*, 347 U.S. 656), violation of state restraint of trade laws (*Weber v. Anheuser-Busch*, 348 U.S. 468), common carrier statutes (*General Drivers v. American Tobacco*, 348 U.S. 978) or a state labor act (*Garmon v. San Diego Unions*, cited). As the Court said in *Weber v. Anheuser-Busch* (348 U.S. 480):

> "... controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised."

and in *Garmon* (359 U.S. 244):

> "... Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations. Regardless of the mode adopted, to allow the State to control conduct which is the subject of national regulation would create potential frustration of national purposes."

This disregard of the asserted grounds for the exercise of state court jurisdiction over matters committed to the

National Labor Relations Board is the only position that can be taken consistent with the purpose of the National Labor Relations Act as construed by this Court. This purpose was concisely stated in *Garner v. Teamsters Union*, 346 U.S. 485, 490:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . ."

To permit the Michigan court to regulate conduct constituting an alleged unfair labor practice over which the Board has traditionally exercised jurisdiction, under the guise of enforcing a private party's common law contract rights would as surely frustrate this purpose as would any of the asserted grounds for state court jurisdiction heretofore advanced and denied by this Court.

CONCLUSION

For the reasons stated, it is respectfully urged that the petition for writ of certiorari be denied, or, in the alternative, the judgment below being obviously correct, that the

petition be granted and the judgment of the Michigan court be summarily affirmed. *United States v. Lane Motor Co.*, 344 U.S. 630.

Respectfully submitted,

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No. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DOYLE SMITH, *Petitioner*,

v.

EVENING NEWS ASSOCIATION

On Writ of Certiorari To The Supreme Court
Of The State Of Michigan

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Michigan (R. 23-36) has not yet been officially reported, but is unofficially reported in 106 N.W. 2d 785.

JURISDICTION

The opinion and order of the Supreme Court of Michigan were entered on January 9, 1961 (R. 23, 36). On April 7,

1961, Mr. Justice Stewart extended the time for filing petition for writ of certiorari to and including May 15, 1961 (R. 37). The petition was granted March 26, 1962 (R. 37-38). The jurisdiction of this Court rests on 28 U.S.C. § 1257(c).

STATUTES INVOLVED

The statutory provisions involved are Section 7, Section 8(a)(1), and portions of Section 8(a)(3), Section 10(a) and Section 10(c) of the National Labor Relations Act, as amended; and the first sentence of Section 203(d) and Section 301(a) of the Labor Management Relations Act, 1947, as amended; 61 Stat. 136 *ff.*, 29 U.S.C. §§ 141 *ff.* These provisions are:

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization. * * *."

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

"(c). * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

"FUNCTIONS OF THE SERVICE

"Sec. 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

QUESTION PRESENTED

Whether a suit for damages for breach of a collective bargaining agreement may be maintained in a state court, when the conduct constituting the breach of contract is also an unfair labor practice under the National Labor Relations Act.

STATEMENT

This is an action of assumpsit to recover damages for breach of contract, filed in the Circuit Court of Wayne County, Michigan (R. 2).

The second amended declaration alleged:

Plaintiff (petitioner here) and his forty-nine named assignors are and were employees of respondent, and are and were members of a labor organization, the Newspaper Guild of Detroit, hereinafter called the Guild (R. 3). The Guild and respondent entered into successive collective bargaining agreements, Article IV, Section 5, of which provided (R. 4):

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild."

While these agreements were in effect a group of respondent's employees belonging to a union other than the Guild went on strike (R. 4). During this strike respondent permitted employees in certain departments, who were not covered by any collective bargaining agreement, to report on the premises, and paid them full wages, even though there was no work available (R. 4-5). However, although petitioner and his assignors were ready to work during the strike, respondent allowed only a few of them to enter the premises, and as a result petitioner and his assignors lost considerable money in wages (R. 4). Respondent's refusal

to pay full wages to petitioner and his assignors during the strike, while paying full wages to other employees, was in violation of the contract provisions set forth above (R. 5).

Petitioner claimed damages in the amount of $20,000 (R. 5).

Respondent's answer denied certain of these allegations and asserted that "[t]he Court has no jurisdiction over the subject matter of this suit" (R. 7).

At the conclusion of the pre-trial hearing, the judge stated that this question of jurisdiction "should properly be disposed of first, before extensive testimony is taken" (R. 23). Accordingly, at the opening of the trial respondent moved to dismiss for lack of jurisdiction, on the following grounds (R. 11):

> "1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and
>
> "2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter."

The parties stipulated that respondent, which publishes a newspaper, is engaged in commerce within the meaning of the National Labor Relations Act, as amended (R. 9, 23).

The trial court granted the motion to dismiss. Its opinion states (R. 10):

> "This Court, if it proceeded to a trial on the merits, would be required to determine whether or not plaintiff and his assignees were discriminated against, by reason of their Guild membership, when defendant employed on a full-time basis and paid its unorganized employees but did not do the same for all those employees who were Guild members. Such discrimination, if found to exist, would constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act . . ."

After reviewing various decisions of this Court and of the lower courts on the issue of preemption, the trial court's opinion concludes (R. 19-20):

> "Finally, in order to allow recovery on the contract, this Court would be required to find discrimination of a kind which would also be an unfair labor practice and thus subject to correction by the National Labor Relations Board.
>
> "In view of the cases cited in this opinion, defendant's motion to dismiss for lack of jurisdiction should be granted."

The Supreme Court of Michigan affirmed. It held *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, to be controlling, and declared (R. 35):

> "Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress —that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and thereby circumvent the plain mandate of Congress."

(The rationale of the state Supreme Court is further discussed *infra*).

SUMMARY OF ARGUMENT

The courts below held that the subject matter of this suit is within the exclusive jurisdiction of the National Labor Relations Board because the conduct alleged in the complaint as a violation of the collective bargaining agreement would also be an unfair labor practice under the

National Labor Relations Act. We submit that the courts below erred in so holding.

This Court held in a series of cases at the last Term that the preemption doctrines of such cases as *Garner* v. *Teamsters Union*, 346 U.S. 485, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, are not applicable to suits for breach of collective bargaining agreements. It further held, both explicitly and by necessary implication, that judicial jurisdiction over a suit for breach of a collective bargaining agreement is not ousted because the conduct alleged to constitute the breach may also be an unfair labor practice, or otherwise be arguably subject to § 7 and § 8 of the National Labor Relations Act. *Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *RCA, Local Unions Nos. 128 and 633* v. *Lion Dry Goods*, 369 U.S. 17. See *In re Green*, 369 U.S. 689, 694 (opinion of Harlan, J., dissenting in part).

Assuming, arguendo, that the issue is still open, we submit that both the policies of the Labor Management Relations Act and the decisions of the NLRB support the jurisdiction of courts and arbitrators over issues of contract interpretation and violation, even though unfair labor practices within the jurisdiction of the NLRB may be directly or collaterally involved.

The Congress, in the enactment of the Labor Management Relations Act, undertook to implement three separate but interrelated policies: (1) Unions and employers are encouraged to provide for final and binding arbitration as the method for settling disputes over the application or interpretation of collective bargaining agreements. § 203(d). (2) Collective bargaining agreements are made legally binding as a matter of federal law, and federal remedies are provided for their enforcement in addition to those existing under state law. § 301. (3) Breach of a collective bargaining agreement as such is not an unfair

labor practice. Through these policies there runs the common thread of promoting industrial self-government. Employers and unions are encouraged, as a matter of federal labor relations policy, themselves to provide for the solution of disputes, either by arbitration or by contractual provisions enforceable in the courts, in lieu of leaving all disputes to adjudication by the NLRB or to a trial of economic strength.

These policies require, for a number of reasons, that courts and arbitrators have concurrent jurisdiction over issues of contract interpretation and violation, even though the activities giving rise to these issues are also, in the formula of *Garmon*, "arguably subject to § 7 or § 8 of the Act."

A large portion of the issues of contract interpretation and validity which are litigated and arbitrated, and particularly the latter, involve matters arguably subject to the Act. If all these issues were removed from judicial and arbitral jurisdiction, the policies of Congress to encourage arbitration, and to provide federal judicial remedies for breach of contract while preserving state remedies therefor, would be substantially frustrated. A large volume of cases would be added to the Board's load, and the policy, followed by the Board itself, of favoring arbitration of contractual issues would be upset.

In any event, it is not possible for courts and arbitrators, in every instance to segregate and renounce jurisdiction over all issues of contract interpretation and validity which involve questions arguably subject to the Act. Often these questions are inextricably intermingled with others. In other situations courts and arbitrators cannot, in ruling on issues of contract enforcement, avoid passing on the legal consequences of activities arguably subject to the Act, unless they are to create a no man's land.

The reverse is likewise true. Even though the Congress decided not to make breach of contract an unfair labor practice, and to leave contract enforcement "to the usual processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 41) the Board engages in a vast amount of contract interpretation.

There is, therefore, simply no way that courts and arbitrators can be excluded from considering in contract cases issues arguably subject to the Act, or that the Board can be excluded from considering a vast range of contractual issues.

Concurrent judicial and arbitral jurisdiction over contractual questions which involve issues arguably subject to the Act unquestionably will produce the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. However, such concurrent jurisdiction is not only unavoidable, but will augment existing possibilities for "diversities and conflicts" to only a minor degree.

Furthermore, under this Court's holdings in *Boys Markets* and *Lucas Flour*, "a single body of federal law" (369 U.S. at 104) will govern the interpretation of collective bargaining agreements no less than the interpretation of the Act. Conflicting interpretations of the Act and of collective bargaining agreements which will result from concurrent jurisdiction can, therefore, be resolved by this Court.

ARGUMENT

The courts below held that the subject matter of this suit is within the exclusive jurisdiction of the National Labor Relations Board because the conduct alleged in the complaint as a violation of the collective bargaining agreement would also be an unfair labor practice under the National

Labor Relations Act. We submit that the courts below erred in so holding.

While the question was still an open one when the courts below rendered their decisions, this Court has now held, we submit, that the jurisdiction of the courts, whether state or federal, over suits for violation of collective bargaining agreements is not ousted because the activities asserted to constitute the contract violation are also arguably subject to § 7 and § 8 of the National Labor Relations Act. This position is in line with the position to which the NLRB has, in general, adhered over the years, and with the policies of the Labor Management Relations Act. The weight of authority in the lower courts likewise supports concurrent judicial and arbitral jurisdiction.

I

This Court Has Held That The Courts Have Jurisdiction Over A Suit For Breach Of A Collective Bargaining Agreement, Even Through The Conduct Constituting The Breach May Also Be An Unfair Labor Practice.

In holding that this suit is within the exclusive jurisdiction of the National Labor Relations Board, and that the state courts therefore lack jurisdiction over the subject matter of the suit, the Supreme Court of Michigan relied primarily on (R. 27-35) this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (second decision). It quoted, *inter alia*, this Court's statement in *Garmon* (p. 245; R. 29):

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

And, after a lengthy review of Justice Harlan's concurring opinion in *Garmon*, the Supreme Court of Michigan concluded (R. 35-36):

> "Since it is, to say the least, fairly debatable whether the conduct here involved is federally protected, then under both the majority and concurring opinions of *Garmon*, the judgment of the trial court must be affirmed."

It is evident that the state Supreme Court was utterly confused: no one had suggested that respondent's conduct was "federally protected."[1] Rather, both parties agreed that the conduct alleged was federally prohibited: the question, as the Michigan court elsewhere correctly stated, was (R. 25):

> "Does a State court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the National Labor Relations Act as amended?"

At the time the court below handed down its decision it was possible to say, in the language of Judge Magruder in *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F. 2d 364, 367 (1st Cir. 1956):

> "There has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over

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[1] The natural assumption would be that when the Court said "federally protected" it meant "federally prohibited." However, the Court's lengthy review of and reliance on the concurring opinion in *Garmon*, which rested its view that there was preemption on the "narrow ground" that the activities involved "may fairly be considered protected" under the federal Act (359 U.S. at 249), seems to rule out this explanation.

> acts constituting a contract violation as well as an unfair labor practice."

We submit, however, that this issue was disposed of in favor of concurrent jurisdiction in a series of cases decided by the Court at the last Term, beginning with *Dowd Box Co.* v. *Courtney*, 368 U.S. 502.

In *Dowd Box* suit was brought in a state court in Massachusetts by local union officers as representatives of the membership of the local. Shortly before the expiration of a collective bargaining agreement representatives of the local union and of the company had agreed in negotiations to certain changes in the agreement, including a wage increase. These changes were embodied in a "stipulation" which was signed by the representatives of each party. The company initially announced that it would put the changes into effect, but later repudiated the "stipulation" on the ground that "its bargaining representatives has acted without authority." 368 U.S. at 504. The complaint asked for an order declaring the contract valid and enjoining the company from violating it, and for an accounting and damages.

The company urged that the jurisdiction of the federal courts under § 301(a) of the Labor Management Relations Act was exclusive, and that the state court therefore had no jurisdiction over the controversy. The state court held that it had jurisdiction, ruled that the collective bargaining agreement was valid and binding, and entered a money judgment in conformity with the agreed to wage increase. The Supreme Court of Massachusetts affirmed.

This Court likewise affirmed. It said (368 U.S. at 508-509):

> "The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the

> availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts."

The Court went on to point out that the considerations which had led it to find federal preemption in such cases as *Garner* were not applicable to suits for breach of collective bargaining agreements. After quoting the well-known passage in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490, to the effect that Congress did not merely lay down a substantive law of labor relations, but confided "primary interpretation" to a specially constituted tribunal, i.e., the NLRB, this Court said (368 U.S. at 513):

> "By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

While the Court did not specifically advert to the point, it can hardly have escaped its attention that the conduct of the company, which the state courts held constituted a breach of conduct, was also, in the language of *Garmon*, "an activity * * * arguably subject to § 7 or § 8 of the Act," i.e., a refusal to bargain collectively. Indeed, the company called attention to that aspect of the case. It argued (Petitioner's brief, pp. 21-26), that even if federal court jurisdiction under § 301 were not exclusive in every case, it should be exclusive where, as in the case at hand, the alleged breach of contract was also an unfair labor practice. In reply the union did not deny that the company's conduct was arguably an unfair labor practice, but simply urged (p. 16*ff.*), as this Court ultimately held, that the considerations which had led the Court to find preemption in

such cases as *Garner* and *Garmon* were inapplicable to suits for breach of collective bargaining agreements.

The week following *Dowd Box* the Court decided *RCIA, Local Unions Nos. 128 and 633* v. *Lion Dry Goods*, 369 U.S. 17. In that case the unions sued under § 301 to compel the employer to comply with two arbitration awards which had been rendered under a strike settlement agreement. The question at issue, which was decided by this Court in the affirmative, was whether the settlement agreement was a collective bargaining agreement within the meaning of § 301. Here again, however, it can hardly have escaped the Court's attention that the arbitration awards involved issues "arguably subject to § 7 or § 8 of the Act," i.e., the reinstatement of strikers and the unions' "right of access to the employees' cafeteria in order to communicate with employees during their non-work time." (369 U.S. at 23).

The next case decided by the Court, *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, involved a different type of situation. In that case the collective bargaining agreement recognized the right of the company to discharge any employee whose work was unsatisfactory, and provided for final and binding arbitration, but did not contain a no-strike clause. The company fired an employee for unsatisfactory work and the union went on strike. Ultimately, after the strike had ended, the discharge was submitted to a Board of Arbitration which decided in favor of the company.

The employer brought suit in a Washington state court for damages for losses caused by the strike, and a judgment in its favor was affirmed by the state Supreme Court. 57 Wash. 2d 95, 356 P. 2d 1. The state Supreme Court rejected the contention of the unions that the NLRB had exclusive jurisdiction over the controversy. It held that *Garmon* was not applicable because the activities involved did not, in its

view, fall within the purview of § 7 or § 8 and because, in any event, it thought preemption not applicable to a suit for damages for breach of a collective bargaining agreement. The court likewise rejected the contention that the federal courts had exclusive jurisdiction under § 301(a). On the merits the court held that the question whether the strike was in violation of the contract was controlled by state and not federal law, and that under state law the strike was in violation of the contract.

This Court affirmed. It said (369 U.S. at 101):

> "One of those issues [which this case presents]—whether §301(a) of the Labor Management Relations Act of 1947 deprives state courts of jurisdiction over litigation such as this—we have decided this Term in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502. For the reasons stated in our opinion in that case, we hold that the Washington Supreme Court was correct in ruling that it had jurisdiction over this controversy."

At this point the Court appended a footnote, which reads:

> "Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. See *Local 4264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352 (C. A. 10th Cir.); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C. A. 3d Cir.); see generally *Lodge No. 12, District No. 37, Int'l Assn. of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 407 (C. A. 5th Cir.); *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (C. A. 9th Cir.); *Local 181, Int'l Union of Operating Engineers* v. *Dahlem Constr. Co.*, 193 F. 2d 470 (C. A. 6th Cir.). As pointed out in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. at . Congress 'deliberately chose to leave

the enforcement of collective agreements "to the usual processes of the law." See also H. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. It is, of course true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such. See generally Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52."

The Courts of Appeals decisions cited by the Court in this footnote represent the prevailing view among the lower courts that courts and arbitrators have jurisdiction over "conduct which is a violation of a contractual obligation" even though it "may also be conduct constituting an unfair labor practice."[2]

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[2] Upholding jurisdiction: *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956) (suit for specific enforcement of agreement to negotiate; cited in *Lucas Flour*, n.9); *Textile Workers* v. *Arista Mills Co.*, 193 F. 2d 529, 533-534 (4th Cir. 1951) (suit for specific enforcement of contract and damages); *Lodge 12, Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 405 (5th Cir. 1958), *cert. denied*, 358 U.S. 880 (suit to compel arbitration; cited in *Lucas Flour*, n.9); *Operating Engineers, Local 715* v. *Gulf Oil Corp.*, 262 F. 2d 80 (5th Cir. 1958), *cert. denied*, 359 U.S. 992 (suit to compel arbitration); *Operating Engineers, Local 181* v. *Dahlem Constr. Co.*, 193 F. 2d 470 (6th Cir. 1951) (suit for damages; cited in *Lucas Flour*, n.9); *Modine Mfg. Co.* v. *Machinists*, 216 F. 2d 326 (6th Cir. 1954) (suit for declaratory judgment and damages); *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (9th Cir. 1958) (suit for damages; cited in *Lucas Flour*, n.9); *Local 4264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352, 357-358 (10th Cir. 1959) (suit to compel arbitration, for declaratory judgment and for damages; cited in *Lucas Flour*, n.9); *Local 1055 IBEW* v. *Gulf Power Co.*, 175 F. Supp. 315 (N.D. Fla. 1959) (suit to compel arbitration); *Ryan Aeronautical Co.* v. *UAW, Local 506*, 179 F. Supp. 1 (S.D. Cal. 1959) (suit to enjoin enforcement of arbitration award);

Local 410, RCIA v. *Sears Roebuck & Co.*, 185 F. Supp. 558 (N.D. Cal. 1960) (suit to compel arbitration); *Ludlow Mfg. & Sales Co.* v. *Textile Workers*, 108 F. Supp. 45 (D. Del. 1952) (suit for damages); *Brady Transfer & Storage Co.* v. *Local 710, Meat Drivers*, 30 LRRM 2535, 22 LC ¶67,121 (N.D. Ill. 1952) (suit for damages); *Employing Plasterer's Assn.* v. *Plasterers Union*, 186 F. Supp. 91 (N.D. Ill. 1959) (suit for declaratory judgment); *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949) (suit for damages); *Gremio de Prensa* v. *Voice of Puerto Rico*, 121 F. Supp. 63 (D. P.R. 1954) (suit for damages); *Local 28, IBEW* v. *Md. Chapter, NECA*, 48 LRRM 2031, 42 LC ¶ 16,946 (D. Md. 1961) (suit for declaratory judgment); *Carey* v. *General Electric Co.*, 50 LRRM 2119 (S.D.N.Y., April 19, 1962) (suit to compel arbitration); *Grunwald-Marx, Inc.* v. *Clothing Workers*, 52 Cal. 2d 568, 343 P. 2d 23 (1959) (suit to confirm arbitration award); *A. L. Gage Plumbing Supply Co.* v. *Local 300, Hod Carriers*, 50 LRRM 2114 (Cal. App. 1962) (suit for injunction and damages, decided on authority of *Dowd Box* and *Lucas Flour*; *Aaronson Bros. Paper Corp.* v. *Fishko*, 144 N.Y.S. 2d 643 (N.Y. Sup. Ct. 1955), *aff'd*, 286 App. Div. 1009 (suit to stay arbitration); *In re Columbia Broadcasting System*, 205 N.Y.S. 2d 85 (N.Y. Sup. Ct. 1960) (suit to stay arbitration); *Ohio Valley Builders Exchange, Inc.* v. *Carpenters*, 50 LRRM 2572 (Ohio Ct. Com. Pleas, 1962) (suit to enjoin breach of contract).

Contra: United Elec. Workers v. *General Elec. Co.*, 231 F. 2d 259 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 872 (suit for declaratory judgment); *Plumbers Union, Locals 169 and 741* v. *Marchese*, 81 Ariz. 182, 302 P. 2d 930 (1956), *rehearing denied*, 82 Ariz. 30, 307 P. 2d 1038 (1957) (suit to enjoin breach of contract); *Industrial Workers, Local 286* v. *Star Products Co.*, 41 LRRM 2840 (Ill. App. 1958) (suit for declaratory judgment as a validity of contract); *Local 774, IAM* v. *Cessna Aircraft Co.*, 341 P. 2d 989 (Kan. Sup. Ct. 1959) (suit to compel arbitration); *McAmis* v. *Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. App. 1954) (suit to enforce arbitration award); *Local 502, Hod Carriers* v. *Park Arlington Corp.*, 50 LRRM 2108, 44 LC ¶ 17,578 (N.J. Sup. Ct. 1962) (suit to enjoin breach of contract and for damages; decision below in present case relied on).

Discussing the issue and reserving decision: *United Electrical Workers Local 259* v. *Worthington Corp.*, 236 F. 2d 364 (1st Cir. 1956); *Local 1505, IBEW* v. *Lodge 1836, IAM*, 50 LRRM 2337 (1st Cir., June 4, 1962); *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431 (1956).

The Court then went on to hold that the question whether the strike was in violation of the contract was controlled by federal and not by state law, and that as a matter of federal law the strike was in violation of the contract. On this last point the Court noted that several Courts of Appeals and the NLRB had held that a strike over a dispute which the collective bargaining agreement provided should be settled by arbitration, was a violation of the agreement, and said, "We approve that doctrine."

Lucas Flour differs from *Dowd Box*, *Lion Dry Goods*, and the present case, in that conduct there held to constitute a breach of contract, that is, the strike, did not also constitute an unfair labor practice. However, if the union had prevailed on its contention that the strike was not in violation of the contract, then the strike would, at least arguably, have been protected under the Act. Thus the strike was, in the formula of *Garmon*, "an activity • • • arguably subject to § 7 or § 8 of the Act." And the Court did not, in holding that (n. 9) "the preemptive doctrine of cases such as" *Garmon* "is not relevant" in suits for breach of a collective bargaining agreement, draw any distinction between conduct arguably prohibited by the Act and conduct arguably protected.

This aspect of *Lucas Flour* is dealt with in the dissenting opinion, though not in the opinion of the Court, in *In re Green*, 369 U.S. 689. In that case an employer obtained *ex parte* from a trial court in Ohio a temporary restraining order against picketing. Green, as attorney for the union, took the position that the dispute was within the exclusive jurisdiction of the NLRB, and advised that the restraining order be ignored. It appears that the employer contended that the picketing was in violation of a collective bargaining agreement, while the union contended that the agreement

had been signed by unauthorized agents. The union filed with the NLRB a charge of refusal to bargain, which had not been acted on at the time of the injunction.

The trial court held Green in contempt, and the state Supreme Court affirmed. Neither of the Ohio courts passed on the issue of preemption: they held Green in contempt under the doctrine of *United States* v. *United Mine Workers*, 330 U.S. 258.

This Court reversed. It said that the trial court was without power to hold Green in contempt if it lacked jurisdiction to issue the restraining order by reason of federal preemption, and that it violated due process by holding Green in contempt without according him a hearing on the issue of preemption. Like the Ohio courts, this Court did not pass on the issue of preemption, stating that it was impossible to determine it on the record.

Justice Harlan and Clark dissented in part. They said that the claim of the state court to jurisdiction was not frivolous, and added (369 U.S. at 694):

> "*Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 104, makes clear that the rule stated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, ousting state courts from dealing in tort with activities even arguably subject to §§ 7 or 8 of the National Labor Relations Act, does not apply when relief is sought for breach of an alleged collective bargaining agreement. State jurisdiction was upheld in *Lucas Flour*, although the activity there would have been protected by § 7 if not forbidden by a contract provision whose interpretation was fairly disputed, and thus was still arguably protected."

The latest opinion of the Court in this field is *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238. Like *Lucas Flour*, that was a suit by an employer for damages for alleged breaches

of a no-strike clause. The union urged (Brief 65-72) that the work stoppages, even if in violation of the contract, were arguably protected activity under the decision of this Court in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, and that the NLRB therefore had exclusive primary jurisdiction under the *Garmon* decision (Brief 65-72). The Court disposed of this contention in a footnote, which reads:

> "* * The Union also argues that the preemptive doctrine of such cases as *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, is applicable and prevents the courts from asserting jurisdiction. Since this is a § 301 suit, that doctrine is inapplicable. *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n. 9."

We submit that these decisions of the Court at the 1961 Term require reversal of the decision below in the present case. In two of the cases, *Dowd Box* and *Lion Dry Goods*, the conduct alleged as a breach of contract also constituted, at least arguably, an unfair labor practice, just as in the present case, and that factor was called to the Court's attention in *Dowd Box*. In two other cases, *Lucas Flour* and *Atkinson* v. *Sinclair Refining Co.*, on the other hand, no unfair labor practice was involved, but it was urged as a defense that the conduct alleged as a breach of contract was federally protected, and that the NLRB therefore had exclusive primary jurisdiction. However, the Court upheld the jurisdiction of the courts in all four cases. In such cases as *Garmon* and *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, the Court, in holding that there was federal preemption, had drawn no distinction between cases involving conduct asserted to be prohibited by the Act and those involving conduct asserted to be protected; and in these four cases at the last Term the Court likewise drew no such distinction in holding the preemption doctrines of earlier decisions inapplicable in breach of contract suits.

These cases appear to us to dispose of the present case. In a recent address analyzing this Court's decisions at the last Term dealing with § 301, William Feldesman, Solicitor of the NLRB, said:

> "From this statement by the Court [*i.e.*, *Lucas Flour*, n.9] we learn generally, and I use that word advisedly, that the Board's exclusive jurisdiction will not attach under principles of pre-emption when suits cognizable under 301 are instituted for violation of collective bargaining contracts. And we also derive from this language the rule that where conduct that is a breach of a contractual obligation may also be an unfair labor practice, relief granted by a Federal or State court under 301 does not affect the Board's jurisdiction to remedy the unfair labor practice. The Courts and the Board have concurrent jurisdiction." (Feldesman, Section 301 and the National Labor Relations Act, Daily Labor Report, June 7, 1962, p. E-1; excerpted 50 LRRM 158.)

However, the Court granted the petition for certiorari in the present case subsequent to its decisions in *Dowd Box* and *Lucas Flour*, and, instead of reversing *per curiam*, invited the Solicitor General to file a brief (R. 37-38). We shall, therefore, assume, arguendo, that the issue is still open, and will undertake to demonstrate that both the policies of the Labor Management Relations Act and the decisions of the NLRB support the jurisdiction of courts and arbitrators over issues of contract interpretation and violation, even though unfair labor practices within the jurisdiction of the NLRB may be directly or collaterally involved.

In *A. I. Gage Plumbing Supply Co. v. Local 300, Hod Carriers*, 50 LRRM 2114 (1962), a California District Court of Appeals ruled that in *Dowd Box* and *Lucas Flour* this Court "expressly upheld" the concurrent jurisdiction of the courts over breach of contract actions, even though the conduct alleged to constitute the breach of contract might also be an unfair labor practice.

II

The Policies Of The Labor Management Relations Act And Of The NLRB Support The Jurisdiction Of Courts And Arbitrators Over Contract Issues That Also Involve Unfair Labor Practices.

Congress declared, in § 203(d) of the Act:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

By § 301(a) of the Act Congress conferred on the federal district courts jurisdiction over suits for violation of contracts between an employer and a union, without regard to the amount in controversy or diversity of citizenship. Section 301(b) provides that a labor union may sue or be sued as an entity.

Thus the Congress adopted the policy of encouraging the settlement of disputes by final and binding arbitration pursuant to voluntary agreement of the parties. As this Court declared in *United Steelworkers of America* v. *Warrior & Gulf N. Co.*, 363 U.S. 574, 578:

> "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."

At the same time Congress made collective bargaining agreements "equally binding and enforceable on both parties." S. Rep. No. 105, 80th Cong., 1st Sess. p. 15; see *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 452 *ff*.

The bills passed by the House and the Senate both also contained provisions making violation of a collective bargaining agreement an unfair labor practice. S. Rep. *supra* pp. 20-21; H.R. Rep. No. 245, 80th Cong., 1st Sess. p. 21.

However, these provisions were dropped in conference, the House Conference Report stating (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 42):

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

This legislative history is summarized in *Lincoln Mills*, 353 U.S. at 455-456; and *Dowd Box*, 368 U.S. at 508-513.

One further item of legislative history appears to be pertinent. The first sentence of § 10(a) of the National Labor Relations Act, which Taft-Hartley carried over without change from the Wagner Act, provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

In the Wagner Act, the succeeding sentence read:

> "This power shall be exclusive, and shall not be affected by any other means of adjustment or provision that has been or may be established by agreement, code, law, or otherwise: * * *"

The Taft-Hartley Act eliminated from this sentence the words "shall be exclusive and" (and also the word "code"). The House Conference Report gives the following explanation:

> "The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's

> power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, *when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.*" H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. (Italics added.)

The reference to "provisions making unions suable" must refer primarily to § 301. It appears, accordingly, that the conferees specifically contemplated that the jurisdiction of the courts over contract suits under § 301 would overlap the jurisdiction of the Board to prevent unfair labor practices, and intended that the Board and the courts should have concurrent jurisdiction. See Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 729 (1956).

Thus the Congress, in the enactment of the Labor Management Relations Act, undertook to implement three separate but interrelated policies: (1) Unions and employers are encouraged to provide for final and binding arbitration as the method for settling disputes over the application or interpretation of collective bargaining agreements. (2) Collective bargaining agreements are made legally binding as a matter of federal law, and federal remedies are provided for their enforcement in addition to those existing under state law. (3) Breach of a collective bargaining agreement as such is not an unfair labor practice. Through these policies there runs the common thread of promoting industrial self-government. Employers and unions are en-

couraged, as a matter of federal labor relations policy, themselves to provide for the solution of disputes, either by arbitration or by contractual provisions enforceable in the courts, in lieu of leaving all disputes to adjudication by the NLRB or to a trial of economic strength.

These policies require that courts and arbitrators have concurrent jurisdiction over issues of contract interpretation and violation, even though the activities giving rise to these issues are also, in the formula of *Garmon*, "arguably subject to § 7 or § 8 of the Act." This is so for a number of reasons, some positive and some negative, which may be summarized as follows:[1]

A large portion of the issues of contract interpretation and validity which are litigated and arbitrated, and particularly the latter, involve matters arguably subject to the Act.[2] If all these isues were removed from judicial and arbitral jurisdiction, the policies of Congress to encourage arbitration, and to provide federal judicial remedies for breach of contract while preserving state remedies therefor, would be substantially frustrated. A large volume of cases

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[1] All of these points are fully developed in Dunau, Contractual Prohibitions of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52 (1957). This article was cited by the Court in *Lucas Flour*, n.9. See also Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 727 (1956); Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II, 59 Col. L. Rev. 269, 281-301 (1959); Note, 59 Col. L. Rev. 153, 168-171 (1959).

[2] "* * * [A]rbitrators uniformly reject the argument that the NLRA prevents them from exercising jurisdiction * * *." Note *op. cit. supra*, 69 Harv. L. Rev. at 728

would be added to the Board's load,[a] and the policy, followed by the Board itself, of favoring arbitration of contractual issues, would be upset.

In any event, it is not possible for courts and arbitrators in every instance to segregate and renounce jurisdiction over all issues of contract interpretation and validity which involve questions arguably subject to the Act. Often these questions are inextricably intermingled with others. In other situations courts and arbitrators cannot, in ruling on issues of contract enforcement, avoid passing on the legality of activities arguably subject to the Act, unless they are to create a no-man's land.

Even if courts and arbitrators could accomplish this feat of segregation, and even if they renounced jurisdiction over all issues arguably subject to the Act, all possibility of conflict between the Board and courts and arbitrators would

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[a] In *Ryan Aeronautical Co.* v. *U.A.W., Local 506*, 179 F. Supp. 1 (S.D. Cal. 1959) the court, ruling in favor of concurrent jurisdiction, stated (p. 4):

> "It is apparent that many breaches of labor contracts also constitute unfair labor practices; so that, if plaintiff's contention were adopted, it would virtually abrogate the arbitration provisions contained in a majority of the contracts."

The Massachusetts Supreme Judicial Court similarly observed, in *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431, 435 (1956):

> "We recognize that, as a practical matter, the national labor relations board cannot undertake to determine everything which is sought to be brought before it, and declines to review many cases. 69 Harv. L. Rev. 725, 729 et seq. We cannot believe that Congress intended to create a no-man's land where voluntary arbitration is barred and the national labor relations board may be too overburdened to enter."

However, the Massachusetts court did not find it necessary to decide the issue of concurrent jurisdiction.

not be eliminated. For the Board finds it necessary, in many instances, to rule on the validity and interpretation of contracts, just as courts and arbitrators find it necessary, in some situations, to rule on the legal consequences of activities arguably subject to the Act.

Concurrent jurisdiction between courts and arbitrators, on the one hand, and the Board, on the other, will no doubt produce some conflict and diversity of ruling. However, concurrent jurisdiction is not only unavoidable but will augment existing possibilities of conflict to only a minor degree. And, since federal law governs the interpretation both of the Act and of collective bargaining agreements, conflicts can ultimately be resolved by this Court.

We proceed to the elaboration of these points.

A. Courts and Arbitrators Must Rule on the Legal Consequences of Activities Arguably Subject to the Act.

1. *Areas of overlap.*—The obstacles to any doctrine excluding courts and arbitrators from adjudicating contractual issues if they involve activities arguably subject to the Act become apparent when we consider some of the areas of overlap, and how the courts, arbitrators, and the Board have handled the problems of exclusive or concurrent jurisdiction to which these areas of overlap give rise.

(a). *The union's status as bargaining representative.*—As Justice Frankfurter noted in his dissent in *Lincoln Mills*, 353 U.S. at 482-483, the validity of the collective bargaining agreement depends on whether the union negotiating it was the legal collective bargaining representative. That is a question within the jurisdiction of the NLRB. *La Crosse Telephone Corp.* v. *Wisconsin Employ. Rel. Bd.*, 336 U.S. 18. To hold that the courts, therefore, may not

enforce collective bargaining agreements would, however, render § 301(a) a nullity.[7]

When, on the other hand, the Board orders an employer to withdraw recognition from a union, and to cease giving effect to a contract with it, the Board's order is of course binding on the courts, and a suit to enforce the contract may not thereafter be maintained. *Duralite Co. v. Local 485, IUE*, 50 LRRM 2556 (E.D.N.Y., June 22, 1962).

(b). *Discharge of employees.*—Virtually every collective bargaining agreement prohibits discharge except for cause, and many, like the agreement in the present case, explicitly paraphrase the ban in § 8(a)~~(3)~~ against discrimination because of union membership or activity.[8] These clauses are the source of a large volume of arbitration.[9]

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[7] In *Industrial Workers, Local 286 v. Star Products Co.*, 41 LRRM 2840 (Ill. App. 1958) the court ruled that it had no jurisdiction over a suit for a declaratory judgment as to the validity of a collective bargaining agreement, because the contract's validity involved legal issues under the National Labor Relations Act. The court said (41 LRRM at 2841):

> "Specifically, the court would have been required, by plaintiff's suit, to apply the foregoing sections of the act to the question whether the plaintiff union, at the time the alleged contract was entered into, represented in fact a majority of defendant's employees in an appropriate unit for collective bargaining purposes. Unless the court so held, it could not adjudge, as plaintiff prayed, that the contract was 'valid from its inception.' "

[8] Dunau estimates that "probably more than half of the agreements contain a provision of the latter sort. *Op. cit. supra* at 68." And see Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725 (1956).

[9] The Labor Arbitration Report series, published by the Bureau of National Affairs (which starts in 1946, but reports only a small fraction of all arbitration awards), lists in the Index-Digest some

Where, as in the present case, the union relies on a contractual provision which paraphrases the Act, the issues under the contract and under the Act are precisely the same. Even when the contract contains only the more general clause forbidding discharge or other disciplinary action except for "cause" arbitrators' decisions are likely to involve issues "arguably subject to § 7 or § 8 of the Act." Since no arbitrator will uphold, as for "cause," a discharge on account of union membership or other activity protected by the Act, arbitrators frequently must determine whether activities claimed to justify discharge are, on the one hand, legitimate activities protected by the Act, or are, on the other hand, misconduct constituting cause for discharge. This is exactly the criterion the Board uses in ruling on the validity of challenged discharges or other disciplinary action: indeed § 10(c) of the Act forbids the Board to order the reinstatement or payment of back pay to an employee "suspended or discharged for cause."[9]

This overlap of Board and arbitral functions, as well as the Board's policy toward arbitration of these issues, is illustrated by *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

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75 cases under the topic, "Discharge and Discipline—Union activities" (Sec. 118-664). Many other cases are found in Section 4 "Interference with Organization and Discrimination against Union Members."

[9] The House Conference Report on Taft-Hartley states:

"Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c)." (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 59).

As part of the settlement of a strike the company and the union agreed to arbitrate the reinstatement of four strikers whom the company asserted had engaged in misconduct during the strike. The arbitration award was in favor of the company, and the four employees then filed a charge of illegal discrimination in violation of § 8(a)(3) and (1) of the Act. The Board dismissed the complaint. It declared that it was not bound, "as a matter of law, by an arbitration award" (p. 1081), but that in its discretion it would recognize it.[11] The Board said (p. 1082):

> "In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances *we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of of the arbitrators' award.*" (Italics added.)

The discharge or other discipline of employees for conduct during a strike gives rise to disputes involving large numbers of employees, and the resolution of these disputes by arbitration unquestionably relieves the Board of a con-

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[11] Section (10(a) of the National Labor Relations Act provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise • • •."

Literally this provision states only that the power of the NLRB to remedy an unfair labor practice is not affected by the existence of an arbitral or judicial remedy. The Board has gone beyond that, and has consistently held that it is not bound, as a matter of law, by an arbitration award. *Monsanto Chemical Company*, 97 NLRB 517, *enforcement granted*, 205 F. 2d 763 (8th Cir. 1953). And see *Lucas Flour*, 369 U.S. 95, 101, n.9).

siderable volume of work. For example, 226 employees were discharged for alleged misconduct during the 1955 Southern Bell strike, and the arbitration of these discharges occupied the time of several attorneys and arbitrators for many weeks. Had the Board handled these discharges as unfair labor practices, their adjudication would have employed many more people for much longer. See, *e.g., Kohler Co.*, 128 NLRB 1062, *enf'd in part and set aside in part*, 49 LRRM 2485 (D.C. Cir. 1962), *cert. denied*, 30 U.S.L. Week 3375.

Any proposition that the jurisdiction of the Board in these situations is exclusive would be startling. Only last spring this Court enforced an arbitration award as to the reinstatement of strikers, and the only issue it perceived was whether the strike settlement agreement was so informal as not to be a "contract" within § 301. *RCIA, Local Unions Nos. 128 and 633 v. Lion Dry Goods*, 369 U.S. 17, discussed *supra* p. 14.[13]

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[12] See Dunau, *op. cit. supra* at 71.

[13] In *McAmis v. Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. App. 1954), the contract contained both a clause prohibiting discrimination on account of union activity, and one prohibiting discharge "unjustly." An employee was discharged for upbraiding a fellow worker for crossing a picket line during a strike, and the union took the case to arbitration. The arbitration board held that the discharge violated both of the beforementioned contract clauses, and ordered reinstatement. The company refused to comply, on the ground that the asserted grievance alleged an unfair labor practice within the exclusive jurisdiction of the NLRB. The Missouri Court of Appeals sustained the award. It agreed that the issue of discharge for union activity was within the exclusive competence of the Board, but held that the question whether the employee was discharged "unjustly" was a separable issue, and properly for determination by the arbitration board. Surely this hair-splitting demonstrates its difficulty rather than its desirability.

(c). *The duty to bargain collectively.*—The employer's obligation under the Act to bargain collectively, and his obligations under the contract to deal with the union, are another area of major overlap.

When employees are represented by a union, it is a violation of the employer's obligation under § 8(a)(5) "to bargain collectively" for the employer to institute changes in wages, hours, or working conditions without first negotiating with the union. *NLRB* v. *Katz*, 369 U.S. 838. However, unilateral changes by an employer are also often challenged in arbitration or in the courts, as violative of the recognition or other clauses of the contract.[14]

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[14] See, e.g., two cases, discussed in Dunau, *op. cit. supra* at 56-58, which arose out of the refusal of employees to testify before a congressional committee.

In one case the company issued a policy statement that it would discharge employees refusing to testify. The union sued for a declaratory judgment, asserting that the unilateral promulgation of the policy was a violation of the recognition clause of the contract. The Court of Appeals for the District of Columbia Circuit dismissed the action, on the ground that the union's claim was that the company had committed an unfair labor practice by refusing to bargain, and was, "therefore, within the exclusive primary jurisdiction" of the NLRB. *United Elec. Workers* v. *General Elec. Co.*, 231 F. 2d. 259, *cert. denied*, 352 U.S. 872.

In the second case the company discharged two employees who refused to testify. The union took the case to arbitration, asserting both that the company had unilaterally changed the conditions of employment, in violation of the recognition clause, and that the discharges were not, in the language of the contract, for "proper cause." The arbitration board ordered reinstatement; the company refused to comply; and the union sued to enforce compliance. The district court dismissed, on the ground that the alleged refusal to bargain was the essence of the grievance, so that the matter was within the exclusive jurisdiction of the NLRB. (136 F. Supp. 31, D. Mass. 1955.) The Court of Appeals reversed. It said that the grievance rested on two grounds, i.e., the failure to consult the

Further, § 8(d) of the Act makes it a refusal to bargain for either party to a collective bargaining agreement to "terminate or modify such contract" unless certain prescribed notices are given and waiting periods observed. However, the question whether one party or the other has undertaken to "terminate or modify" may turn solely on the interpretation of the contract. In such a situation the Board has on occasion refused to entertain the dispute, and has left it for ultimate judicial adjudication, even though the dispute is not only "arguably" but clearly subject to § 8 of the Act. In dismissing a case of this sort the Board said, *United Telephone Company of the West*, 112 NLRB 779, 781 (1955):

> "The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. * * * [T]he Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'"

The Board added:

> "[T]he Union's recourse in this situation was to exhaust the possibility of settling the overtime question

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union, and that the discharges were not for "proper cause"; that the latter ground was separable and involved no issues of NLRB preemption; and that it was therefore not necessary to decide the preemption issue presented by the first ground of the grievance. *United Electrical Workers, Local 259 v. Worthington Corp.*, 236 F. 2d. 364.

This latter case illustrates both the intermixing of contract and NLRA issues, and that issues may sometimes be deliberately phrased so as to create or avoid overlapping jurisdiction.

> by negotiation, and, failing such settlement, to seek judicial enforcement of its construction of the contract."

The problem is further complicated by the fact that a collective bargaining agreement may validly prescribe the procedures to be followed by an employer in changing the terms or conditions of employment, such as establishing or varying piece rates. See Dunau, *op. cit. supra* pp. 72-80; Cox and Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv. L. Rev. 1097, 1120-1125 (1950). In these situations whether there is a refusal to bargain in violation of the Act turns on whether there is a breach of the collective bargaining agreement. A court or arbitrator who finds that there is a breach of the agreement is of necessity also ruling that there is an unfair labor practice, while, conversely, if the NLRB undertakes to adjudicate the unfair labor practice charge, it must of necessity interpret the contract.[15]

Again, the employer's duty to bargain in good faith includes the duty to furnish to the union data needed by it for effective bargaining, and this duty—

> "continues through the life of the agreements so far as it is necessary to enable the parties to administer

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[15] After a full review of the problem, Dunau concludes (*op. cit. supra* at 79-80):

> "In short, no regulation of unilateral action during the term of an agreement can escape the dilemma that, if the regulation be by the NLRB, it will involve that body in the administration of agreements, and that, if the regulation be by court or arbitrator, it will involve them in determining as a contractual question the discharge of what is also a statutory obligation. Adjudication by either overlaps the function of the other."

See also Meltzer, *op. cit. supra*, 59 Col. L. Rev. at 282-283.

the contract and resolve grievances or disputes." *Sinclair Refining Co.* v. *NLRB* (5th Cir., July 26, 1962).

Whether a union is entitled to particular data requested for use in prosecuting a grievance may depend, however, on whether the grievance is cognizable under the contract, and the resolution of that issue may require determination of the merits of the dispute. As the Court of Appeals for the Fifth Circuit noted in the above case:

> "In unmistakable terms, then, the Board, in order to determine relevance and pertinency—and hence the amenability of such evidence to a coercive order to produce—had to determine the very issue in dispute."

In other words the Board first held that under the contract the union's grievance was meritorious, and then held that the employer was therefore under a statutory duty to supply the information requested by the union for use in prosecuting the grievance. On review the court held, in the first ruling of its kind, that the Board *must* in such a situation leave the question of the employer's duty to produce information to the determination of the arbitrator as a part of the arbitration proceeding.

Thus the court resolved that particular problem of overlap between Board and arbitrator in favor of exclusive jurisdiction for the latter. This decision is thus far unique, but the Board itself has usually, as the court noted, reached the same result in the exercise of an assumed discretion. A recent case of this sort is *Hercules Motor Corp.*, 136 NLRB No. 145 (May 2, 1962). There the union filed a grievance claiming that the company had violated the agreement in setting certain piece rates. The company rejected the grievance and the union, as a prelude to taking the matter to arbitration, asked that a union time study man be permitted to examine the company's data relating to the grievance, and that he be allowed in the plant to observe the operations involved. The company rejected these requests and sug-

gested that the union take that issue to arbitration also. Instead the union filed a charge of refusal to bargain. The Board dismissed the complaint. It said:

> "On its face, the contract provides machinery devised by the parties themselves for settling such a dispute. Yet, instead of exhausting this procedure and proceeding within the framework of its contract, the Union elected to file charges asking the Board to intervene and resolve the dispute. While, under Section 10(a) of the Act, the Board is not bound as a matter of law by private agreements, we are of the opinion that it would not effectuate the policies of the Act for us to thus intervene in the case."

Accord: Denver-Chicago Trucking Co., 132 NLRB No. 123 (1961); *Montgomery-Ward & Co., Inc.*, 137 NLRB No. 41 (June 2, 1962).[16] But *cf. General Electric Co.*, 137 NLRB No. 188 (July 31, 1962).

The employer's statutory duty to bargain collectively imposes also certain obligations to negotiate with the union in the event that a plant is shut down, or, in some circumstances, if a part of the operation is transferred to another plant, or contracted out. See, *e.g., Renton News Record*, 136 NLRB No. 55 (1962); *Town & Country Mfg. Co.*, 136 NLRB No. 111 (1962). Since collective bargaining agree-

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[16] Earlier Board decisions on the effect to be given to arbitration awards or to the availability of arbitration are reviewed in Dunau *op. cit. supra* at 59-64; and Note *op. cip. supra*, 69 Harv. L. Rev. at 731-736. The General Counsel likewise refuses to issue complaints regarding refusal-to-bargain disputes which have been submitted to arbitration, or which he considers could more appropriately be resolved by arbitration, under a collective barainging agreement. See, *e.g.*, G.C. Adm. Dec. No. SR-1292, May 16, 1962. (Charge of refusal to bargain. Layoffs resulting from plant removal submitted to arbitration.); G.C. Adm. Dec. No. SR-1353, May 29, 1961. (Charge of refusal to bargain, based on a refusal to furnish information for the processing of a grievanee.)

ments deal with these same subjects, the Board, an arbitrator, or the courts, may be called on to rule on the statutory or contractual rights of employees when a plant is shut down or a particular operation is transferred or contracted out, and the legal questions at issue in these proceedings may overlap or even be identical."

Other illustrations of the pervasiveness of the overlap between issues arising under collective bargaining agreements and those arguably subject to the Act are discussed *infra*, and they could be multiplied indefinitely. Indeed nearly any article of the standard collective bargaining agreement can give rise to questions "arguably subject to § 7 or § 8 of the Act."

Thus if the policies of the Congress to provide additional judicial remedies for the enforcement of collective bargaining agreements (§ 301(a)), and to encourage the settlement through arbitration of disputes over the application or interpretation of a collective bargaining agreement (§ 203(d)), are to be given effect, it is necessary that courts and arbitrators continue to exercise jurisdiction over issues of contractual interpretation, even where they involve issues arguably subject to the Act. In *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, the Court said (p. 567):

[fn] The Court of Appeals for the Tenth Circuit held that the courts had jurisdiction in a suit challenging a leasing arrangement as in violation of the collective bargaining agreement "even though the aggrieved [sic] incident or act can be said to be an unfair labor practice and within the jurisdiction of the Board . . ." *Local 1264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352, 358, cited by this Court in *Lucas Flour*, 369 U.S. 95, 101, n.9. *Accord: In re Columbia Broadcasting System*, 205 N.Y.S. 2d 85 (N.Y. Sup. Ct. 1960). *Cf. Locals 231 and 243, ILGWU* v. *Beauty Bilt Lingerie*, 48 LRRM 2995 (S.D.N.Y. 1961).

> "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement."

While this statement was not made in the context of the issue presented in this case, it was made in a somewhat related context: the Court was admonishing the judiciary against narrowing the reach of arbitration by excluding grievances not deemed meritorious.

2. *Court suits and arbitration indistinguishable as respects preemption.*—It is true that the present case does not involve arbitration, but a state court suit for damages, so that the statutory policy, and other policy considerations, which support encouragement of the arbitral remedy, are not directly at stake. However, a ruling in this case in favor of exclusive Board jurisdiction will likewise limit the *scope* of arbitration, unless the Court holds, in this case or another, that the Board's jurisdiction precludes concurrent jurisdiction by courts but not by arbitrators.

Judge Magruder has suggested that, "[w]ith respect to arbitrators, as distinguished from courts, a narrower position concerning the application of the preemption doctrine is possible." *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F. 2d 364, 367 (1st Cir. 1956). And see Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 736-737 (1956).

With all deference to the distinguished jurist, we submit, however, that such a position is not really "possible." Nothing in the statutory language confers concurrent jurisdiction upon arbitrators while withholding it from courts. There is likewise no basis in the legislative history for imputing to Congress any such preference for arbitral over judicial proceedings.

As already noted, Congress did articulate a policy in favor of final and binding arbitration of contract disputes. At the same time, however, by § 301(a) it made collective bargaining agreements legally binding as a matter of federal law and provided federal judicial sanctions for their breach. *Lincoln Mills*. Section 301(b) makes it clear that Congress had damage suits in mind as a sanction. While the Court said in *Lincoln Mills*, 353 U.S. at 458, "we see no reason for restricting § 301(a) to damage suits," and held § 301(a) to extend also to suits for specific performance of an agreement to arbitrate, there can be no doubt that the primary purpose of Congress in enacting § 301 was to facilitate damage suits against unions. See the legislative history set forth in *Dowd Box*, 368 U.S. at 508-513.[18]

As far as state court suits are concerned, this Court declared in *Dowd Box*, 368 U.S. at 509, that "* * * Congress expressly intended not to encroach upon the existing jurisdiction of the state courts." Here again there can be no doubt that it was state court damage suits, rather than suits to compel arbitration, that Congress was concerned to preserve. When Congress decided not to make the breach of a collective bargaining agreement an unfair labor practice, but instead to leave the enforcement of collective bargaining agreements "to the normal processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42) those processes, as far as the states were concerned, were primarily damage suits and not enforcement of agreements to arbitrate. At that time many states still followed the

[18] "The pertinent legislative history suggests that the primary objective of Congress was to secure increased union compliance with no-strike clauses by facilitating the recovery of damages for the breach of such damages." Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II, 59 Col. L. Rev. 269, 280-281 (1959).

common law rule against enforcement of executory agreements to arbitrate. See *Lincoln Mills*, 253 U.S. at 456.

Admittedly "the intent of Congress," which controls on questions of preemption by federal statutes, is often a constructive rather than an actual intent. More often than not the role of the Court is to determine what Congress would have intended had it foreseen the problem, rather than what Congress actually did intend. *Cf. Garmon*, 259 U.S. at 240-241. However that may be, it is, we submit, impossible to impute to the 80th Congress the intent, constructive or actual, to give preference as respects preemption to arbitration over damage suits.

3. *Intermixture of contractual and NLRA issues.*—Apart from the fact that judicial and arbitral jurisdiction would be drastically curtailed by any rule excluding issues arguably subject to the Act, it would be exceedingly difficult for courts and arbitrators to avoid trenching upon these issues. Dunau, *op. cit. supra*, points out (p. 58):

> "Thus a contract violation may cover the same ground as an unfair labor practice or it may go beyond it. The two do not necessarily involve identical considerations in determining either the merits of the dispute or the relief to be granted. They may overlap but not fully. If adjudication by a judge or arbitrator were to be wholly excluded in such a situation, no tribunal would exist to enforce that part of the bargain which goes beyond the NLRA but which is integrally related to that part of the bargain which duplicates the NLRA. It would therefore seem to follow that the parties cannot create an enforceable contractual obligation to augment the statutory protection conferred by the NLRA even though such enhancement is not offensive to the NLRA. On the other hand, if court or arbitrator may adjudicate that part of the dispute which is not within the NLRB's jurisdiction, a single transaction would be bifurcated between two tribunals, neither empowered to resolve the matter fully and each perhaps pro-

ceding from diverse assumptions. Neither total nor partial exclusion of court or arbitrator seems therefore satisfactory. This suggests the conclusion that neither court nor arbitrator should be excluded at all."

Occasionally a court has attempted to segregate out and renounce jurisdiction over issues which are arguably subject to the Act. The Court of Appeals for the First Circuit held discharges arbitrable insofar as the grievances rested on a contract clause prohibiting discharge save for "proper cause," but declared that it need not decide whether the grievances were arbitrable insofar as they rested on the recognition clause of the contract.[19] The latter clause, in the court's view, presented a problem of preemption because of its interrelation with the employer's duty under the Act to bargain collectively. In sustaining an arbitration award directing the reinstatement of an employee discharged for asserted misconduct during a strike, a Missouri court of appeals held that the discharge was arbitrable insofar as the grievance rested on a contract clause prohibiting discharge "unjustly," but that it was not arbitrable insofar as it rested on a contract clause prohibiting discrimination on account of union activity.[20] Insofar as the grievance rested on the latter clause it presented, the court said, an issue within the exclusive competence of the NLRB.

These attempts at isolating and rejecting jurisdiction over issues arguably subject to the Act illustrate, we submit, the difficulty of such a course rather than its feasibility.[21] The arbitration award enforced by the Missouri court dealt with a dispute which clearly was subject to the Act, i.e., whether the employee was discharged for protected

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[19] *United Electrical Workers, Local 259* v. *Worthington Corp.*, discussed at greater length *supra* p. 32, note 14.

[20] *McAmis* v. *Panhandle Eastern Pipe Line Co.*, discussed *supra* p. 31, note 13.

[21] See also Meltzer, *op. cit. supra*, at 288-289.

strike activity, in which event his discharge was in violation of § 8(a)(3) and (1) of the Act, or for unprotected misconduct. Whether such a dispute is within the exclusive primary jurisdiction of the federal Board, or whether courts and arbitrators may also assume jurisdiction under a collective bargaining agreement, can hardly turn on whether the union relies on a specific clause of the contract which paraphrases the Act or on some more general clause.

4. *Courts cannot avoid issues subject to the Act.*—However, the decisive consideration against exclusive Board jurisdiction over all issues arguably subject to the Act, even if they arise under a collective bargaining agreement, is not that such a doctrine would drastically curtail the reach of arbitration and of judicial enforcement of contracts, or that it would be difficult for courts or arbitrators to isolate these issues from other contractual issues, but that sometimes these issues arise in such a way that they cannot come before the Board, so that courts or arbitrators must decide them or a no man's land will result.

Lucas Flour, discussed *supra* pp. 14-18, was a case of that sort. The collective bargaining agreement in that case provided for the final and binding arbitration of discharges, but did not contain a no-strike clause. The company discharged an employee, assertedly for unsatisfactory work, and the union went on strike. The company sued for damages for breach of contract. The question before the courts was whether the strike was in violation of the contract. If, as the union contended, the strike was not in violation of the contract, it was protected activity under the federal Act: hence the litigation involved activities arguably subject to § 7 or § 8 of the Act. (See the dissenting opinion in *In re Green*, quoted *supra* p. 19.)

However, as this case arose, there was no way for this issue under the Act to be presented to the NLRB, because

there was no claim that either the employer or the union had committed an unfair labor practice. If the employer had discharged the strikers, instead of suing for damages, then the strikers or the union could have filed with the Board a charge of violation of § 8(a)(3) and (1), and, assuming that the General Counsel issued a complaint, the Board would have been called upon to rule, as it has in many similar cases, on whether the strike was protected activity under the Act, or misconduct outside the Act's protection. The ultimate issue for the Board, as for the courts, would have been whether the strike was in violation of the contract. In other similar cases the Board has held that a strike is a violation of the contract, and hence unprotected.[22] But there was no way that either of the parties could have presented the issue to the Board in *Lucas Flour*. Thus

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[22] In *Lucas Flour* this Court cited some of these Board decisions, as well as court decisions in breach of contract cases, in support of its ruling that the strike was a violation of the contract. The leading Board case, which the Court cited, is *W. L. Mead, Inc.*, 113 NLRB 1040. In that case the employer discharged striking employees, and a complaint issued under § 8(a)(1) and (3) of the Act. The Board held that the strike was in violation of the contract, that it was therefore not protected by the Act, and that the discharge of the strikers was, accordingly, not in violation of the Act. The Court of Appeals for the First Circuit, as this Court also noted, subsequently ruled the same way in a case arising out of the same strike, in affirming a judgment for damages against the union for breach of contract. (On this occasion Judge Magruder failed to note that the Court was deciding a dispute arguably subject to the Act.) *Local 25, Teamsters Union* v. *Mead, Inc.*, 230 F. 2d 576. Besides the *Mead* decisions, in *Lucas Flour* the Court cited two other court decisions in damage suits in support of the rule of contract construction it adopted, *United Construction Workers* v. *Haislip Baking Co.*, 223 F. 2d 589 (4th Cir.), and *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346, *modified and affirmed*, 361 U.S. 459; and two decisions in unfair labor practice cases, *NLRB* v. *Dorsey Trailers, Inc.*, 179 F. 2d (5th Cir.), and *NLRB* v. *Sunset Materials*, 211 F. 2d 224 (9th Cir.).

if this Court had upheld the claim of preemption in *Lucas Flour*, the consequence would have been to deny to the company any forum for the adjudication of its claim of breach of contract.

When, as in the present case, the conduct alleged to constitute a breach of contract would also constitute an unfair labor practice, the complainant has available a choice of remedies of a sort. Even then it is a limited choice, because when a charge is filed under the Labor Act the General Counsel of the Board has absolute and unreviewable discretion as to whether to issue a complaint.[7] However, even this degree of choice of remedies is lacking in situations like *Lucas Flour* where the conduct asserted to consti-

[7] The role of the General Counsel is correctly described in *Ohio Valley Builders Exchange* v. *Carpenters*, 50 LRRM 2572, 2574 (Ohio Ct. of Common Pls. 1962):

> "General Counsel's authority in this respect is somewhat similar to the authority of a Prosecuting Attorney in reference to filing or not filing an information in a criminal case, except nothing can be done about it if General Counsel and his Regional Director refuse to file a complaint before the Board.
>
> "There is a right of appeal from a hearing and judgment on the merits and issues by the National Labor Relations Board to the Federal Courts. There is no appeal to a court of law from the refusal of the General Counsel of the National Labor Relations Board to file a complaint before that Board. The General Counsel is an administrative officer, not a judicial officer.
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> "The issues in the instant case have not been determined by a judicial agency and, therefore, the plaintiff has not had a judicial determination of the issues in question on their merits; it has not had its day in court; it has not had a right to examine and cross examine the witness; it has had no right of appeal from the ruling of the General Counsel; the issues raised by the plaintiff in its petition are not res judicata."

tute a breach of contract is not, in any event, an unfair labor practice, though it may be protected under the Act. Any application of the *Garmon* doctrine of preemption in these situations would leave the complainant remediless.

Another situation where an issue arguably subject to the Act is determinative of a breach of contract action, and there is no way of getting a Board decision on the issue, is posed by Feldesman, *op. cit. supra*. After referring to *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, he states:

> "There, in rough summary, the Supreme Court held that, in spite of an ordinary no-strike provision in a labor agreement, there is no waiver of the right to strike against substantial employer unfair labor practices, and a work stoppage in such circumstances is a protected concerted activity. Now let us assume that a strike has been called by a contracting union despite the existence of the usual no-strike clause; the employer brings suit against the union under 301 for money damages; and the union thereafter defends the action, whether instituted in a Federal or State court, on the ground that the employer had committed egregious unfair labor practices and the union consequently struck to protest and gain relief from them. Does the Court have jurisdiction or is the matter within the exclusive competence of the Board? Note that to resolve the principal issue relating to the union's breach of contract, the Court must presumably first determine if the employer engaged in unfair labor practices of moment which preceded the strike."[24]

Yet another such situation is illustrated by *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, 362 U.S. 605. There a union member covered by a collective bargaining agreement, joined by employers who were parties to it,

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[24] Meltzer, *op. cit. supra*, at 289-291, likewise discusses *Mastro Plastics* in arguing for concurrent jurisdiction.

brought suit against the unions to enjoin the carrying out of certain provisions of the contract, on the ground that they violated the Ohio anti-trust laws. The state courts held for the plaintiff, but this Court sustained the unions' contention that the National Labor Relations Act protected this right to enter into the contractual provisions in question. This Court said that the state anti-trust law could not

> "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." 358 U.S. at 295.

Probably the commonest situation which confronts courts and arbitrators with the necessity of determining issues subject to the Act is where it urged as a defense that a contract is invalid, in whole or in part, under the Act or policies of the Board; and often the posture of the case is such that that issue cannot be presented to the Board. Needless to say, the courts regularly rule on the sufficiency of these defenses.[25] Judicial rulings in these

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[25] See, *e.g.*, *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (9th Cir. 1958) (suit by employer for damages for breach of contract; defense that contract was illegal; held that hiring hall and union security provisions were illegal and an unfair labor practice under NLRA, but were severable from remainder of contract); *Iob* v. *Los Angeles Brewing Co.*, 183 F. 2d 398 (9th Cir. 1950) (NLRB ruling that contract did not bar an election, because petition timely filed, held not a holding that contract was invalid); *Local 28, IBEW* v. *Md. Chapter, NECA*, 48 LRRM 2031, 42 LC ¶ 16,946 (D. Md. April 24, 1961) (declaratory judgment that union has validly terminated contract, including complying with notice requirements of § 8(d)); *Local 1055, IBEW* v. *Gulf Power Co.*, 175 F. Supp 315 (N.D. Fla. 1959) (contract recognizing union as bargaining representative for supervisors held not invalid under Act); *Lewis* v. *Kerns*, 175 F. Supp. 115 (S.D. Ind. 1959) (contract not invalid because of union's failure to comply

cases have inevitably resulted in some conflict between court and Board doctrine. For example, the Board has over the years tended to regard an invalid union security clause as invalidating a contract for all purposes,[25] while the Court of Appeals for the Ninth Circuit has reached the opposite conclusion.[26] Again, in *Textile Workers, UTW* v. *Textile Workers, TWUA*, 258 F. 2d 743 (7th Cir. 1958) the court enforced a no-raiding agreement between unions despite the Board's position that enforcement of the agreement was contrary to the policy of the Act.[27] The opposite view was taken, and the Board's position was sustained, in *Doll & Toy Workers* v. *Metal Polishers*, 180 F. Supp. 280 (S. D. Cal. 1960). In general, however, the courts have followed

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with § 9(f), (g) and (h) of Taft-Hartley); *Locals 231 and 243, ILGWU* v. *Beauty Bilt Lingerie*, 48 LRRM 2995 (S.D.N.Y. 1961) (subcontracting clause not invalid under § 8(e) or § 302); *Independent Union* v. *Proctor & Gamble*, 49 LRRM 2703 (E.D.N.Y., February 21, 1962) (failure to give notice required by § 8(d) does not extend contract); *United Public Workers* v. *University of Chicago*, 23 LRRM 2352, 16 LC ¶ 64,988 (Ill. Cir. Ct. 1949) (same); *Aaronson Bros. Paper Corp.* v. *Fishko*, 144 N.Y.S. 2d 643 (N.Y. Sup. Ct. 1955), *aff'd*, 286 App. Div. 1009 (union security clause illegal under NLRA held severable); *Ebinger Baking Co.* v. *Bakery Drivers*, 48 LRRM 2274, 42 LC ¶ 16,992 (N.Y. Sup. Ct. 1961) (same).

[25] This doctrine of the Board was rejected by the Court in *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71. Nevertheless the Board has continued to apply it automatically and broadly in holding that a contract containing a defective union security clause does not bar an election. See NLRB Annual Report, 1961, p. 44 *ff.*

[26] *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d. 820.

[27] This case involved a more direct conflict between Board and court than a mere conflict in views as to the policy of the Act. The Board had ordered an election on petition of the defendant union, notwithstanding the no-raiding agreement, and the court thereafter ordered the union to withdraw the petition. A full account of this contretemps is given in Meltzer, *op. cit. supra* at 296-301.

established Board doctrine, just as this Court did in *Lucas Flour*, and certainly no intolerable conflict or confusion has resulted.

In adjudicating suits for breach or enforcement of a contract, the courts may likewise have to determine the effect to be given to orders of the NLRB. Thus in *Modine Mfg. Co.* v. *Machinists*, 216 F. 2d 326 (6th Cir. 1954) the Board had ordered an election under its "premature extension" rule during the life of a contract between the Machinists Union and the company. Another union—the Steelworkers—won the election and was certified, and the Machinists thereafter brought suit against the company to enforce the contract, and especially the dues check-off provision thereof. The court ruled for the company. It held that the certification of the Steelworkers Union by the Board rendered the recognition clause of the contract between the Machinists and the company inoperative, and that thereafter the contract had to be administered by the Steelworkers. *Accord, Kenin v. Warner Bros. Pictures, Inc.*, 188 F. Supp. 690 (S.D.N.Y. 1960). In *Retail Clerks* v. *Montgomery Ward*, 50 LRRM 2702 (N.D. Ill. 1962), the union, subsequent to decertification by the Board in a representation proceeding, brought suit to enforce the collective bargaining agreement, which by its terms had not yet expired. The NLRB intervened, and urged both that the court lacked jurisdiction and that the decertification terminated the rights of the union under the contract. The court rejected the former contention but sustained the latter. See also *Duralite Co.* v. *Local 485, IUE*, 50 LRRM 2556 (E.D.N.Y., June 22, 1962), dismissing a suit to enforce a contract because the Board had entered an order directing the employer to withdraw recognition from that union and to cease giving effect to the contract.[29]

[29] The decisions are uniform, on the other hand, that the courts do not have jurisdiction over a suit, even though based on a con-

There thus are innumerable situations in which the courts cannot, despite the Board's primary jurisdiction over unfair labor practice disputes, avoid determining in contract actions whether conduct is protected or prohibited under the act.[30]

B. The Board Finds It Necessary to Rule on the Validity and Interpretation of Contracts.

The reverse is likewise true. Even though the Congress decided not to make breach of contract an unfair labor practice, and to leave contract enforcement "to the usual processes of the law" (see *supra*, p. 23), the Board engages in a vast amount of contract interpretation.

Much of this contract interpretation is unavoidable.

Section 8(e), popularly known as the "hot cargo" provision, which was added to the Act in 1959, makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied," of the sort proscribed. In enforcing this provision the Board must of necessity rule on whether contracts have

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tract, involving the scope of a bargaining unit under a Board certification. "A union by contract with an employer cannot define the scope of its certification; that is the Board's function." *Local 1505, IBEW* v. *Lodge 1836, IAM*, 50 LRRM 2337, 2338 (1st Cir., June, 1962). *Accord, Carey* v. *Westinghouse Electric Corp.*, 50 LRRM 2740 (N.Y. Ct. App., July, 1962), *affirming* 49 LRRM 2225 (N.Y. App. Div., 1961); *Local 6, Chemical Workers* v. *Olin Mathieson Corp.*, 202 F. Supp. 363 (S.D. Ill. 1962). But *cf. Freight Drivers, Local 557, IBT* v. *Quinn Freight Lines*, 195 F. Supp. 180 (D. Mass. 1961).

[30] There are even occasional situations which do not involve the validity or interpretation of a collective bargaining agreement, but where the courts nevertheless find it necessary to interpret the National Labor Relations Act, despite the Board's primary jurisdiction. See, *e.g.*, *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62; *Hill* v. *Florida*, 325 U.S. 538.

been entered into and on their interpretation. See, *e.g.*, *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F. 2d 20 (5th Cir. 1962) *enforcing* 130 NLRB 968 (1961).[31]

Although § 8(a)(3) and § 8(b)(2) do not explicitly provide, as does § 8(e), that the bare execution of a contract inconsistent with their provisions shall constitute an unfair labor practice, the Board has long held that it is an unfair labor practice to enter into a union security agreement not meeting the requirements of § 8(a)(3). See NLRB Annual Report, 1949, p. 85.

The Board likewise must sometimes consider and interpret collective bargaining agreement provisions in determining whether there has been a unilateral change in conditions of employment, and hence a refusal to bargain,[32] even though, as developed *supra* pp. 33-34, it sometimes declines to exercise jurisdiction in these situations in favor of arbitration or judicial proceedings.

The Board also frequently gets into the question of contract construction not directly but collaterally in unfair labor practice cases. Feldesman, *op. cit. supra*, gives one illustration:

> "For example, as in the *Mead* case, the Board may be called upon initially to decide whether a contract contains a no-strike obligation in order to reach the question whether the employer by terminating economic strikers has committed an unfair labor practice. For,

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[31] Even prior to the 1959 amendments the Board at times took the position that the bare execution of a hot cargo agreement was an unfair labor practice by the union; but this view was rejected by the Court in *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 U.S. 93, 108.

[32] See, *e.g.*, *Bethlehem Steel Co.*, 136 NLRB No. 135, 50 LRRM 1013 (1962).

as Hornbook law explains, although an economic strike is normally a protected concerted activity under Section 7 of the National Labor Relations Act, it loses that protection if in breach of contract; and while a discharge for engaging in protected concerted activity is an unfair labor practice under Section 8 of the Act, a separation for unprotected conduct is not."

The Board is as much if not more concerned with the execution, interpretation and validity of contracts in representation cases as in unfair labor practice cases. Its doctrines that a valid outstanding contract bars an election for a maximum of two years, but that the validity of the contract on its face may be challenged in a representation proceeding if the contract bar rule is invoked, ensure that contractual issues play a major rule in the determination of representation proceedings. See Annual Report, 1961, pps 39-52.

In short the Board, a the most cursory examination of its Annual Reports makes clear, is as much involved as the courts with issues of the interpretation and validity of collective bargaining agreements.

There thus is no way that courts and arbitrators can be excluded from considering in contract cases issues arguably subject to the Act, or that the Board can be excluded from considering a vast range of contractual issues.

It would be possible, and perhaps justifiable in abstract theory, for the Court to distinguish between situations where it is possible for the party raising the issue arguably subject to the Act to request the Board to determine it, and those where the issue arises in such a context that it cannot be presented to the Board. Such a distinction would, however, be itself a fruitful source of confusion and litigation, and a wide area of inevitable overlap between courts and arbitrators and the Board would still be left.

C. Concurrent Jurisdiction will Augment Disputes and Conflicts to Only a Minor Degree.

Concurrent judicial and arbitral jurisdiction over contractual issues which are arguably subject to the Act unquestionably will produce the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. We suggest, however, that such concurrent jurisdiction is not only unavoidable, as we have sought to show, but that it will augment existing possibilities for "diversities and conflicts" to only a minor degree.

1. The Board, arbitrators, and a majority of the courts, have, for the most part, proceeded all along on the basis of concurrent jurisdiction. While there has been some conflict of substantive doctrine, there does not appear to have been a great deal. Certainly there has been more diversity and conflict over the preemption issue itself than over the substantive question involved.

2. As this Court recognized in *Dowd Box*, 368 U.S. 502, 514, the possibility of conflict among state and federal courts is in any event inherent in the concurrent jurisdiction of state courts over suits on collective bargaining agreements. This Court said:

> "It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which *Lincoln Mills* spoke."

The overlap between the jurisdiction of the Board to prevent unfair labor practices under § 8(b)(4) and the jurisdiction of the courts over damage actions under § 303 like-

wise creates a likelihood of conflict—and some conflict has developed.[33]

3. Under this Court's holdings in *Lincoln Mills*, *Dowd Box* and *Lucas Flour*, "a single body of federal law" (369 U.S. at 104) will govern the interpretation of collective bargaining agreements no less than the interpretation of the Act.[34] Conflicting interpretations of the Act and of collective bargaining agreements which result from concurrent jurisdiction can, therefore, be resolved by this Court. As the Court said in *Dowd Box*, 368 U.S. at 514:

> "To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court."

4. The federal substantive law which will govern in suits on collective bargaining agreements will be derived in

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[33] Compare *NLRB* v. *Donna Artware, Inc.*, 198 F. 2d 645 (6th Cir.); *cert. denied*, 345 U.S. 906, with *Brick & Clay Workers* v. *Donna Artware, Inc.*, 198 F. 2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897.

[34] Feldesman states:

> "Perhaps the most obvious interlacing between the two may be gleaned from the manner in which the Supreme Court in *Lucas Flour* arrived at the rule of substantive law that an exclusive, final and compulsory arbitration provision envisages as to disputes within its coverage an agreement not to strike. To formulate this doctrine of Federal law the Supreme Court relied upon Federal court precedents, including National Labor Relations Board court cases, and the Board's decision to like effect in *W. L. Mead, Inc.*, (113 NLRB 1040).
>
> "There is thus reason to conclude that in piecing together the mosiac of National substantive law that is needed to implement 301, the Supreme Court—and lower Federal and State courts—will look to principles of labor contract law developed in the administration of the National Labor Relations Act. Nor, I suspect, will this be a one-way street. Doubtless Federal contract law evolved under 301 independently by the courts will also have a bearing upon the Board's disposition of cases within its competence to decide."

considerable part from provisions of the Labor Management Relations Act. In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457, the Court said:

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates."

The basic provisions of the National Labor Relations Act are, of course, § 7 and § 8. Surely it would be paradoxical to hold that these sections—which are a major source of the substantive federal law to be applied under § 301—at the same time operate to oust the courts of jurisdiction over all issues arguably within the scope of these sections.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the court below should be reversed.

Respectfully submitted,

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August, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

DOYLE SMITH, *Petitioner*

v.

EVENING NEWS ASSOCIATION

On Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of March 26, 1962 (R. 37-38), inviting the Solicitor General to file a brief expressing the views of the United States.

QUESTION PRESENTED

Whether a suit for damages for breach of a collective bargaining contract between a labor organization and an employer in an industry affecting commerce may be maintained in a State court, when the conduct constituting the breach of contract is concededly also an unfair labor practice under the National Labor Relations Act.

STATEMENT

Petitioner is an employee of the respondent Evening News Association, and a member of the Newspaper Guild of Detroit. Respondent publishes a newspaper in Detroit, Michigan, and is engaged in interstate commerce. (R. 2-3, 9, 21.) At all times relevant herein, there was in effect a collective bargaining contract between respondent and the Guild which provided, *inter alia*, that: "There shall be no discrimination against any employee because of his membership or activity in the Guild" (R. 4).

Alleging a breach of this provision of the contract, petitioner, individually and as assignee of 49 other employees who were also Guild members, brought a common law damage action against respondent in the Circuit Court of Wayne County (R. 3, 4-5). The complaint asserted that during the period December 1, 1955, through January 16, 1956, a group of respondent's employees belonging to a union other than the Guild were on strike; that during the strike respondent permitted employees in the Editorial Department, Business Office and Advertising Department, who were not covered by any collective bargaining agreement, to report on the premises even though there was no work available, and paid them full wages; but that, although petitioner and his assignors were available for work on their regular shifts,[1] respondent allowed only a few of them to enter the premises, and as a result they lost considerable money in wages (R. 4-5). The complaint further asserted that respondent's refusal to pay full wages to the Guild employees, while paying full wages

[1] Petitioner and the employees he represents were employed as janitors, elevator operators and watchmen (R. 9).

to the non-union employees, was in violation of the no-discrimination clause of the Guild contract (R. 5). Damages were claimed in the amount of $20,000 (R. 5).

Respondent's answer denied the charge of discrimination and added that the court, in any event, lacked jurisdiction over the subject matter (R. 5-7). Amplifying the latter defense, respondent also moved to dismiss the complaint on the ground that the acts alleged, if true, would constitute an unfair labor practice under the National Labor Relations Act, and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board (R. 11, 24). The trial court agreed that the subject matter was within the Board's exclusive jurisdiction, and dismissed the suit (R. 10-20).

On appeal, the Michigan Supreme Court affirmed (R. 23-36). Deeming the preemption principles enunciated in *Garmon* and related cases[2] to be controlling, and finding that it was "agreed for purpose of this case that the action alleged as constituting a breach of contract would also constitute an unfair labor practice,"[3] the court concluded that the matter was within the exclusive jurisdiction of the National Labor Relations Board and thus not cognizable in a State court (R. 35-36).

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[2] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

[3] Section 8(a)(3) of the National Labor Relations Act (29 U.S.C. 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Petitioner did not file an unfair labor practice charge with the Board, and one would now be barred by the six-month limitations period imposed by Section 10(b) (R. 35).

SUMMARY OF ARGUMENT

It is the government's position that the considerations which underlie the doctrine of preemption enunciated in *Garmon* have no application to suits for enforcement of collective bargaining agreements, as this Court has recognized in *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, and *Local 174, Teamsters*, v. *Lucas Flour Co.*, 369 U.S. 95, and that to oust the State or federal courts of jurisdiction over such suits would not only fail to promote, but would actively obstruct, the purposes of the National Labor Relations Act. Thus the Michigan courts were not without competence to remedy the alleged breach of contract merely because the conduct alleged might also have constituted an unfair labor practice under the Act.

The enforcement of collective bargaining agreements differs in at least two critical respects from the enforcement of State statutes or tort law, the usual subjects of preemption. (1) When a State court adjudicates controversies under a labor contract in an industry affecting commerce, the law which it applies is federal law and the policy it implements is federal policy. Congress deliberately chose to entrust this aspect of the national regulatory scheme to the State and federal courts, rather than to the Board, and there is no reason to suppose that it intended the courts to relinquish their assigned jurisdiction to remedy contract violations merely because the violation in question might also happen to be an unfair labor practice. (2) Whereas the standards of conduct prescribed by State statute and tort law are created by government and imposed coercively on the parties from without, those prescribed in a collective bargaining agreement are devised by the parties themselves and shaped to the de-

mands of the particular enterprise. It is plain that the parties to a labor contract may, if they so wish, adopt for their own enterprise standards of conduct either more or less stringent than those the Act would require in the absence of contract, and that they may waive freedom which the Act would otherwise grant. Thus the danger of conflicting substantive rules, which is perhaps the touchstone of preemption, is largely banished when it is a *contract*, rather than a rival scheme of governmental regulation, which overlaps the Act. Moreover, where the parties are free to fashion their own substantive rules of conduct, there can be no objection to their selecting their own procedures and remedies. Indeed, it is the declared policy of Congress to allow full play to the methods of adjustment agreed upon by the parties.

Furthermore, the courts may often be in a better position than the Board to provide a full and meaningful solution to the complex of related issues which are frequently involved in a labor controversy. In many contract disputes, the unfair labor practice element, to which the Board's jurisdiction is confined, may be only a small segment of the total problem. In other cases, the unfair labor practice question, though perhaps dispositive of the whole controversy, may turn entirely upon subsidiary questions of contract interpretation which make no demands on the Board's expertise and which might better be decided by the courts, into whose hands Congress put them. Also, courts and arbitrators have a wider and more flexible repertoire of remedies at their disposal than does the Board. While the limitations on Board remedies were urged unsuccessfully upon this Court in the *Garmon* case, we submit that, in light of the important differences be-

tween contractually-created remedies and governmentally-created remedies, it would be destructive of federal policy to deprive parties of the relief contemplated by their collective bargaining agreements merely because the Board might be powerless to grant such relief.

Finally, a decision ousting the State court of jurisdiction in the present case would have a disruptive impact upon the functioning of private grievance arbitration, an institution in favor of which the Board itself has frequently stepped aside.

ARGUMENT

THE STATE COURT WAS NOT DEPRIVED OF JURISDICTION TO REMEDY THE ALLEGED BREACH OF CONTRACT MERELY BECAUSE THE CONDUCT CONSTITUTING THE BREACH COULD ALSO CONSTITUTE AN UNFAIR LABOR PRACTICE UNDER THE NATIONAL LABOR RELATIONS ACT

A. The Garmon Preemption Principles and the Considerations Which Underlie Them

Under *Garmon* and related cases it is settled that State courts may not, through the application of State statutes or tort law, regulate conduct which is protected by Section 7[4] or prohibited as an unfair labor practice by Section 8[5] of the National Labor Relations

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[4] See *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383.

[5] See *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U.S. 953; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468; *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. There is one major exception, *i.e.*, violence. See *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656; *Automobile Workers* v. *Russell*, 356 U.S. 634.

Similarly, the State may not decide representation questions which are subject to the Board's jurisdiction under the Act. See *Bethlehem Steel Co.* v. *New York Board*, 330 U.S. 767; *La Crosse Telephone Corp.* v. *Wisconsin Board*, 336 U.S. 18.

Act.[6] To leave the States free to regulate such conduct "involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law" and "would create potential frustration of national purposes." *Garmon*, 359 U.S. at 244. Therefore, whenever an activity is "arguably subject" to either of the above provisions, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, *supra*, at 245. This rule of preemption obtains whether the State is undertaking to apply labor relations policy or some more general policy, whether its scheme of regulation coincides with or conflicts with the Act, or whether the regulation takes the form of an injunction or merely damages. The rationale for vesting exclusive jurisdiction in the Board was articulated in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid [those] diversities and conflicts

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[6] These principles were recently reaffirmed in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

likely to result from a variety of local procedures and attitudes toward labor controversies * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

B. These Considerations Do Not Apply to Judicial Enforcement of Collective Bargaining Agreements

If the principles summarized above were applicable to the present case, they would, of course, support the conclusion of the Michigan courts that, since the conduct alleged was arguably an unfair labor practice, the State court was deprived of jurisdiction. This Court has indicated, however, in several recent decisions that the *Garmon* preemption principles are not applicable to suits involving judicial enforcement of collective bargaining agreements. Thus, in *Local 174, Teamsters, v. Lucas Flour Company*, 369 U.S. 95, the Court held that a State court had jurisdiction, applying federal law pursuant to Section 301 of the Labor Management Relations Act,[8a] to award damages for strike activity found to be in breach of contract, even though that activity, absent the State court's ultimate finding, was "arguably" protected by Section 7 of the National Labor Relations Act. The Court pointed out that (369 U.S. at 101, n. 9):

> Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a)

[8a] Section 301(a) (29 U.S.C. 185) provides that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. [Citing decisions by the courts of appeals to the same effect.] * * *. It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such. See generally, Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52.[7]

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[7] Nor is a contrary conclusion suggested by *In re Green*, 369 U.S. 689. In that case, the State court, without a hearing, had held a union attorney in contempt for advising his client to continue picketing in violation of an *ex parte* restraining order which issued on application of the employer. The attorney believed that the restraining order was invalid because it enjoined activity which was within the Board's exclusive jurisdiction. It was the employer's position, on the other hand, that the State court was empowered to issue the order since the union activity was in breach of a no-strike clause of a collective bargaining agreement. This Court set aside the contempt citation, on the ground that a State court may not hold a person in contempt for violating an injunction which it "had no power to enter by reason of federal pre-emption," and that, without a hearing, it was impossible to determine "whether or not the dispute was exclusively within the jurisdiction of the National Labor Relations Board under the principles of [citing *Garmon* and *Bus Employees*, *supra*]" (369 U.S. at 692).

Contrary to the view expressed in the dissenting and concurring opinion (369 U.S. at 694), we do not interpret this holding as inconsistent with the views expressed in *Dowd Box* and *Lucas Flour*, *supra*, *viz.*, that the *Garmon* pre-emption principles are inapplicable to a suit to enforce a collective bargaining agreement. We believe that the Court's opinion merely reflects its view that, on the record in *Green*, it was not clear that there was in effect a collective bargaining agreement which would support the em-

See also, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n. 5.[8]

Similarly, in *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, the Court rejected the use of preemption principles to support the contention that Congress had restricted suits to enforce contracts under Section 301 of the Labor Management Relations Act to the federal district courts. After setting forth the passage from *Garner* quoted above, the Court stated (368 U.S. at 513):

> By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements "to the usual processes of the law."

The conclusion that Congress did not intend the doctrine of pre-emption to apply to suits to enforce collective bargaining agreements is supported by the following considerations:

1. The function which a State court performs when it enforces obligations under a collective bargaining

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ployer's suit. The union attorney offered to show, for example, that the alleged collective bargaining contract had been signed by unauthorized agents, and that, at the time of the picketing, a refusal to bargain charge was pending before the Board. 369 U.S. at 691.

[8] These views accord with the almost uniform holdings of the courts of appeals on this question. See *Steelworkers, Local 4261* v. *New Park Mining Co.*, 273 F. 2d 352, 355-358 (C.A. 10); *Lodge No. 12, IAM* v. *Cameron Iron Works*, 257 F. 2d 467 (C.A. 5); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C.A. 3); *Textile Workers* v. *Arista Mills*, 193 F. 2d 529, 533-534 (C.A. 4); *United Electrical Workers* v. *Worthington Corp.*, 236 F. 2d 364, 367 (C.A. 1). But cf. *United Electrical Workers* v. *General Electric Co.*, 231 F. 2d 259 (C.A. D.C.) certiorari denied, 352 U.S. 872; *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 108 (C.A. 7), certiorari denied, 350 U.S. 840.

agreement in an industry affecting commerce is very different from the function it performs when it enforces a State statute or tort law. In the former case, the law which the court applies is not State, but federal law,[9] and the policy it implements is the declared policy of Congress to foster industrial peace by "encouraging the practice and procedure of collective bargaining." See 29 U.S.C. 141. It would not have been surprising had Congress entrusted the enforcement of labor contracts to the same specialized agency which administers other aspects of the national policy. Congress elected, however, not to follow that approach. In 1947, it considered and specifically rejected a proposal which would have made breach of a collective bargaining agreement an unfair labor practice, deciding instead that contract enforcement "should be left to the usual processes of the law and not to the

[9] *Local 174, Teamsters*, v. *Lucas Flour Company*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241, 245-247; *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448. Respondent suggests that since this is a suit by individual employees, rather than by the union, it could not have been brought in a federal court under Section 301 of the Labor Management Relations Act, and is therefore controlled by state, not federal, law. (Br. in Opp. 5). We disagree. The contract sued on is one "between an employer and a labor organization representing employees in an industry affecting commerce" (Section 301, Labor Management Relations Act). Moreover, the provision sought to be enforced—which bans discrimination on account of union membership—affects the union as well as the individual employees and thus cannot be regarded as a uniquely personal right of the employees. Cf. *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437. In these circumstances, it would follow under the decisions cited above that the cause of action is within the purview of Section 301 and that federal law would govern all substantive issues. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1551-52, particularly fn. 69 (1962); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 370-375 (1962).

National Labor Relations Board.'"[10] To widen the availability of the judicial remedy, Congress added Section 301 of the Labor Management Relations Act, which opened the doors of the federal district courts to suits on collective bargaining agreements and authorized the development of a body of federal law, applicable both in State and federal courts, for the resolution of questions involving such agreements. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448.

In light of the above history, the argument for preemption in the present context entails the conclusion that, even though Congress deliberately decided that the courts and not the Board should exercise jurisdiction over suits on collective bargaining agreements, such jurisdiction should nonetheless be deemed withheld whenever the alleged contract violation also happens to be an unfair labor practice. To read a qualification of this magnitude into what Congress sought to achieve through Section 301,[11] without any supporting evidence either in the Act itself or its legislative history, is plainly unwarranted. If anything, indeed, the legislative history of the Taft-Hartley Act tends to suggest that in cases of overlap the Board's remedy was *not* to be exclusive. Thus, the Conference

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[10] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42; Leg. Hist. of the LMRA, 1947 (G.P.O. 1948), 546. The legislative history of Section 301 is detailed in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 452, *Board Box Co.* v. *Courtney*, 368 U.S. 502, 510-511, and *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 205-209.

[11] We assume that, if the preemption doctrine were applicable to suits on collective bargaining agreements, *federal* as well as *State*, courts would be ousted of jurisdiction. Indeed, the Court so indicated in *Garmon*, where it said that "the States as well as the federal courts" must defer to the Board's exclusive competence, 359 U.S. at 245.

Committee on the Labor Management Relations Act dropped from Section 10(a) of the National Labor Relations Act a provision making the Board's power to prevent unfair labor practices exclusive, but retained language providing that this power should be unaffected by other means of adjustment or prevention. The purpose of this action, as the conference report explains, was to make clear "that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."[12]

2. Mechanical application of the preemption doctrine in the present context overlooks fundamental differences between the collective bargaining agreement, on the one hand, and State statutes and tort law on the other, as sources of enforceable rights and obligations. The latter are rules devised by government and imposed coercively upon the parties from without. By contrast, the standards of conduct prescribed by the collective bargaining agreement are self-imposed and are shaped to the particular needs and circumstances of the enterprise whose industrial life they govern.[13]

[12] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52, Leg. Hist. of the LMRA, 1947 (G.P.O. 1948), 556.

[13] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 53 (1957). See also, Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 Col. L. Rev. 269, 282-301 (1959); Note, *Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice*, 69 Harv. L. Rev. 725 (1956).

To be sure, as this Court pointed out in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580, entering into a labor agreement is not as voluntary as is the entry into other contracts, for the law compels the parties to deal with each other, in good faith. However, a choice still exists as to what form the contract is to

Because these obligations are voluntarily assumed, their enforcement by tribunals other than the Board does not entail the same danger of upsetting the federal statutory balance between the interests of labor and management that is present when another governmental body attempts to impose restraints which were not bargained for.[14] The parties to a collective agreement can, if they so wish, adopt for their own enterprise standards of conduct either more or less stringent than those contemplated by the National Labor Relations Act. With some exceptions they can waive rights and privileges granted them by the Act or, in some instances, authorize activities which the Act would otherwise condemn. Thus, whereas the requirements of federal supremacy may make it impossible to invoke a State statute against a peaceful strike, breach of the no-strike clause in a collective bargaining agreement

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take; "it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces" (*Id.*, at 580).

[14] "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99-100. This is especially true with respect to peaceful picketing and strike activity. As the Court observed in *Garner* v. *Teamsters Union*, 346 U.S. 485, 499-500: "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing."

may render a union liable for damages even though in the absence of contract the strike would be privileged. Comment, *Statutory and Contractual Restrictions on the Right to Strike During the Term of a Collective Bargaining Agreement*, 70 Yale L. J. 1366, 1395 (1961). Similarly, the parties may empower the employer to take specified action with respect to wages, hours, or other terms of employment without notifying or consulting the union, though such unilateral action would otherwise be enjoinable as a refusal to bargain. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. *National Labor Relations Board* v. *Katz*, 369 U.S. 736. In short, the possibility of conflicting substantive rules which arises when rival schemes of coercive regulation occupy the same field, and which necessitates the displacement of one scheme by the other, is largely absent when it is a *contract* which overlaps the Act. The very notion of collective bargaining looking towards enforceable contracts assumes the parties will arrange enforceable obligations in addition to those prescribed by federal law.

Thus, while the effectuation of federal policy requires that the legal obligations it imposes be exclusive of other involuntary obligations lest a State proscribe conduct that the federal law intends to be free, the federal policy contemplates the contractual assumption of additional obligations to be enforced in forums other than the NLRB. And, since there is no suggestion that the administrative remedy for an unfair labor practice would be impaired, the provision of contractual remedies for some acts which may also be unfair labor practices cannot interfere with the operation or policy of the Act.

In the present case, it is the possibility of disparate procedures and duplicating remedies,[15] rather than of conflicting substantive rules, which is invoked as an argument for preemption. But the fundamental objection to allowing another forum, such as a State court, to enforce the unfair labor practice provisions of the National Labor Relations Act is that the other forum may adopt an interpretation or grant a remedy different from the federal law. Where the parties are free to fashion their own substantive rules of conduct, there can be no objection to their selecting the procedures and remedies by which those rules are to be interpreted and enforced. Indeed, the goal of collective bargaining is to obtain an agreement which will not only set the terms and conditions of employment for the enterprise, but will also set up machinery for the amicable settlement of disputes arising thereunder. To this end, most labor contracts provide that controversies as to interpretation or application are to be resolved through a grievance procedure culminating in final arbitration.[16] Where the parties have bargained for lawful contractual provisions and agreed upon a procedure for enforcing them, it would promote industrial peace and the private resolution of disputes to give effect to their arrangements, while requiring the parties

[15] The measure of relief in both instances would be substantially the same. Thus, had the Board sustained petitioner's charges, it could have ordered respondent to compensate petitioner and his assignor for the wages lost as a result of the discrimination. The damages sought in the State court suit were for an equivalent amount (R. 35).

[16] As this Court observed in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

to utilize only their remedy before the Board would impair these objectives. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), proclaims that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *" That policy, as this Court has observed, "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566.

To be sure, the contract involved in the present case does not appear to contain an arbitration clause, or, at any rate, not one which would have covered petitioner's grievance. This fact, however, does not impair the above analysis. In choosing not to submit their disputes to arbitration, the parties agreed, in effect, to utilize the established machinery of the courts for resolution of their disputes and to rely upon the normal judicial remedies. To confine petitioners, instead, to their remedies before the Board would defeat their contractual expectations, deprive them of whatever bargained-for benefits the no-discrimination clause was intended to confer, and thus impair the flexibility and autonomy of the bargaining process to almost the same extent as would the preemption of an arbitration provision.[17]

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[17] At this point we should note a potentially significant distinction, the validity of which need not be determined in the present case. Under some circumstances, it might be argued that a collective bargaining agreement merely adopted as such a wide range of obligations imposed by the National Labor Relations Act (*e.g.*,

3. There are cogent practical reasons why the courts should not be forced to relinquish jurisdiction over conduct which is arguably governed by the Act, as well as by contract. In the first place, the aggrieved party may be unable to obtain a hearing on the merits before the Board, either because the General Counsel refuses to bring a complaint or because the Board itself declines to assert jurisdiction. Even though, in some cases, an action for breach of contract could subsequently be brought in a State or federal court,[18] the fruitless resort to the Board would result in added expense, inconvenience, and delay, and might well preclude any meaningful preventive relief.

Second, the unfair labor practice element of many contract questions is only a small part of the total problem, and it is impractical to segment the problem and have part of it adjudicated by the Board and the re-

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the full statutory duty to bargain collectively as interpreted and applied by the NLRB), but provided judicial remedies. See discussion in *Textile Workers* v. *Arista Mills Co.*, 193 F. 2d 529, at 533 (C.A. 4). In such a case, it could perhaps be urged with some force that the parties were attempting to frustrate the congressional policy of providing an exclusively administrative remedy for the statutory obligations. In the overwhelming proportion of collective bargaining agreements, however, including the present case, the parties are prescribing their own substantive code of conduct for the treatment of employees. In some instances the rules they adopt may coincide with obligations imposed by federal law, but they are obviously intended to have their own substantive significance. To deny the tribunals which the parties implicitly or explicitly provided for the enforcement of these contractual obligations, wherever part of them coincides with the statutory obligations, would create the arbitrary and unworkable procedure discussed later in the text.

[18] 29 U.S.C. (Supp. III) 164(e)(2).

mainder by the court or arbitrator.[19] For example, the no-discrimination clause in the present contract is frequently coupled with a provision protecting employees against discharge without "just cause." If the question of wrongful discharge were submitted to a court, it would be empowered, upon finding that there was no discrimination on account of union activity, to go on and determine whether the discharge was in any event a violation of the "just cause" provision. The Board, on the other hand, would exhaust its jurisdiction upon finding no discrimination under Section 8(a)(3).[20]

Frequently, moreover, the unfair labor practice question, though perhaps dispositive of the entire controversy, may turn exclusively upon difficult subsidiary questions of contract construction, *e.g.*, whether unilateral action by the employer is or is not authorized by the collective agreement.[21] Such questions make no demands upon the Board's expertness and might as well, or even better, be adjudicated by arbitrators and the courts, to whose hands Congress confided them.

Finally, there are substantial advantages from the standpoint of remedy in resorting to a court or arbitrator, rather than to the Board. In many cases, though not the present one, the Board would be powerless to grant compensatory relief. And even in a discharge case, where the Board is authorized to grant reinstatement and full back pay, it lacks the flexibility with which an arbitrator, and probably also a judge sitting in equity, could devise an award or penalty

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[19] Cf. *Machinists* v. *Gonzales*, 356 U.S. 617.

[20] See Meltzer, *op. cit.*, pp. 288-289; *Dunau*, *op. cit.*, pp. 68-72.

[21] See Dunau, *op. cit.* pp. 72-80.

which is commensurate with the degree of employee blame.[22]

We recognize the Board's limited remedial power was a consideration urged upon this Court without success in the *Garmon* case. There, the Court held that even "the State's salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme," and that "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board" accentuates the danger of conflict with federal policy. 359 U.S. at 247. However, in light of the important distinctions, discussed at pp. 13-17, *supra*, between contractual rights and remedies, on the one hand, and governmentally-created rights and remedies, on the other, we submit that it would defeat, rather than promote, federal policy to deprive parties of the relief contemplated by their collective bargaining agreements merely because the Board might be powerless to grant such relief.

4. Although no arbitration agreement seems to be involved in the present case, a decision here which ousted the State court of jurisdiction would almost inevitably have a crippling impact upon the operation of private grievance procedures. The effectiveness of these procedures often depends, in the final analysis, upon the availability of judicial sanctions. It is the courts which must compel recalcitrant parties to submit to arbitration and to abide by the arbitrator's decision. Yet, where the subject matter of the labor dispute falls within the purview of Sections 7 or 8 of the Act, a

[22] See Dunau, *op. cit.*, pp. 70-71, 81.

court would intrude upon the Board's exclusive competence by policing the arbitration process just as much as it would by enforcing the underlying substantive obligations themselves. Indeed, the question of preemption has often arisen in the State and lower federal courts in connection with suits to compel or enjoin arbitration, or to enforce an arbitration award.[23] To the extent that the *Garmon* doctrine were applied to prevent the courts from acting in such situations, compliance with arbitration agreements would become merely optional.

Moreover, although we recognize the possibility of a distinction, the considerations which underlie the preemption doctrine, if applicable to suits on collective bargaining agreements, would seem to require arbitrators, as well as courts, to defer to the Board, a result which would seriously undermine the Congressional policy of giving full play to the methods of grievance settlement that the parties themselves have chosen.[24] The strength of that policy has long been recognized by the Board in its administration of the National Labor Relations Act.[25] Though Section 10(a)

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[23] See, *e.g.*, *Steelworkers, Local 4264* v. *New Park Mining Co.*, 273 F. 2d 352 (C.A. 10) (suit to compel arbitration); *Lodge No. 12 IAM* v. *Cameron Iron Works*, 257 F. 2d 467 (C.A. 5) (suit to compel arbitration); *United Electrical Workers* v. *Worthington Corp.*, 236 F. 2d 364 (C.A. 1) (suit for specific enforcement of arbitration award); *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431 (suit to enjoin arbitration); *McAmis* v. *Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. App. 1954) (action to enforce arbitration award).

[24] See p. 17, *supra*.

[25] It should also be noted that, although the Senate Labor Committee had proposed handling breach of a collective bargaining agreement through Board processes as an unfair labor practice (a proposal which was rejected in Conference, *supra*, pp. 11-12), it

of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," the Board, from its earliest days, has declined to exercise jurisdiction with respect to unfair labor questions which had been, or could have been, submitted to arbitration under the collective bargaining contract between the parties.[26] Thus, in *Consolidated Aircraft Corp.*, 47 NLRB 694, it was alleged that the employer had made unilateral changes in wages in violation of Section 8(a)(5) and had discharged two employees in violation of Section 8(a)(3). Finding that the propriety of the wage changes turned on an interpretation of the collective agreement, which could have been, but was not, submitted to arbitration under the contract, and that the question of the discharges could likewise

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added this caveat (S. Rep. No. 105, 80th Cong., 1st Sess., p. 23, Leg. Hist. of the LMRA, 1947 (G.P.O. 1948), 429):

> The committee wishes to make it clear that • • • it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. • • • Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. • • • .

[26] An exception is usually made only where all of the parties have not agreed to be bound by the arbitration procedure, the arbitration proceedings were not fair, or the result reached was repugnant to the purposes and policies of the Act. See *Monsanto Chemical Co.*, 97 NLRB 517; *Wertheimer Stores Corp.*, 107 NLRB 1434.

have been processed under that procedure, the Board dismissed the unfair labor practice charges. With respect to the unilateral change issue, the Board stated (47 NLRB at 706):

> * * * the existence of a collective contract between the parties involved does not preclude the Board from finding that unfair labor practices have taken place and issuing an appropriate order. We are of the opinion, however, that it will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contract to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen. * * *

And, in *Spielberg Manufacturing Company*, 112 NLRB 1080, where it was alleged that the employer had discriminated in violation of Section 8(a)(3) by refusing to reinstate four strikers, the Board dismissed the charges on the ground that the question had been submitted to arbitration under the contract and the arbitrator had determined that the employees had disqualified themselves for reinstatement by strike misconduct. The Board stated (112 NLRB at 1082):

> * * * the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award. * * * *[27]

In summary, to hold that the courts and arbitrators have jurisdiction over conduct which constitutes both a contract violation and an unfair labor practice comports with Congress' decision to leave breach of contract questions to the "usual processes of the law"; it effectuates the congressional policy of encouraging collective bargaining and the private resolution of disputes; and it enables contract questions to be decided by tribunals which are often in better position than the Board to provide a full and meaningful solution. This conclusion, of course, entails the risk of conflicting court and Board determinations, which the *Garmon* principles would avoid. But, it "is implicit in the choice Congress made that 'diversities and conflicts' may occur." *Dowd Box Co.* v. *Courtney*, 368 U.S. at 514. In any event, the risk, at most, is limited to the possibility of conflicting findings of fact.[28] For, as we have noted, the contract action here is within the purview of Section 301 of the Labor Management Relations Act, and hence the State court would be obliged to decide it in accordance with principles of federal

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[27] See also *Crown Zellerbach Corp.*, 95 NLRB 753; *United Telephone Company of the West*, 112 NLRB 779; *Hercules Motor Corp.*, 136 NLRB No. 145.

[28] Cf. *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 642 (C.A. 6), certiorari denied, 344 U.S. 897.

law, in the ascertainment of which it will, of course, look to decisions of the Board. Moreover, a decision by a court or an arbitrator denying relief on the contract claim does not oust the Board of jurisdiction to remedy an unfair labor practice.[29] Should it find that such decision was contrary to Board principles, it would be free to redetermine the issue and provide its own remedy (see p. 9, *supra*).[30]

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[29] Admittedly, charges must be filed with the Board within six months of the alleged unfair labor practice, Section 10(b); 29 U.S.C. 160(b). However, where the practice complained of is a continuing course of conduct, or where complaints are filed concurrently before the court and the Board, the Board may still be able to act even after the court has rendered its decision.

[30] There may be some situations, however, where the action of the court or arbitrator would preclude the Board from making effective its own decision. Suppose, for example, that, during the life of a contract with union A, most of the employees defect to union B, and a question arises as to which union is entitled to administer the contract and to recognition from the employer. If a court in a contract action were to rule in favor of B and the Board in an unfair labor practice proceeding were to rule in favor of A, an intolerable conflict would result. In this event, it would seem that the court decision would have to give away. See Section 10(a) of the National Labor Relations Act; *Doll & Toy Workers* v. *Metal Polishers*, 180 F. Supp. 280 (S.D. Cal.); Meltzer, *op. cit.*, pp. 292-301; cf. *Hill* v. *Florida*, 325 U.S. 538. In an effort to minimize conflicts of this nature, this Court held, in *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 29, that jurisdiction under Section 301 did not require "a preliminary determination of the representative status of the labor organization involved." Such conflicts might further be minimized if the courts were to abstain, at least pending Board determination, from deciding contract questions as to which the judgment and expertise of the Board would be helpful, *e.g.*, whether a contract clause violated Section 8(e) of the National Labor Relations Act or whether certain work is covered by a Board certification. See Meltzer, *op. cit*; *Local No. 1505, Electrical Workers*, v. *Local 1836, Machinists* (C.A. 1), decided June 4, 1962, 50 LRRM 2337, rehearing denied, 50 LRRM 2777; cf. *Local 35, Hod Carriers* v. *Mason Tenders District Council*, 291 F. 2d 496 (C.A. 2). See also, *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-500.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

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No. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DOYLE SMITH,

v.

EVENING NEWS ASSOCIATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Supreme Court of Michigan (R. 23-36) has been officially reported in 362 Mich. 350 (106 N.W. 2d 785).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C., § 1257 (3).

STATUTES INVOLVED

In addition to the statutes specifically mentioned and quoted by Petitioner, there are involved portions of Section 10(b) and Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 136ff., 29 U.S.C. § 141; 1257, Title 28, U. S. Code; and § 609.13, Compiled Laws of Michigan for 1948. These are as follows:

"Prevention of Unfair Labor Practices"

"Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * * "

"Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * "

Title 28, United States Code
Judiciary and Judicial Procedure

§ 1257: "Final judgments or decrees rendered by the highest court of a State in which a decision could be made may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

§609.13, Compiled Laws of Michigan, 1948.

"Sec. 13. All actions in any of the courts of this state shall be commenced within 6 years next after the causes of action shall accrue, and not afterwards, except as hereinafter specified. * * * "

QUESTION PRESENTED

Whether a common law action by an individual employee for back-pay for breach of an agreement with his employer may be maintained in a state court, where the sole conduct of the defendant-employer allegedly constituting the breach was a conceded violation of § 8(a) of the National Labor Relations Act?

STATEMENT

This is an action in assumpsit brought in the Circuit Court for the County of Wayne (Michigan) at law by plain-

tiff (Petitioner herein) for himself, and as assignee of other employees of defendant (Respondent herein), for wages due, against Respondent for the alleged breach of a collective bargaining agreement providing certain benefits to Petitioner and his assignees (R. 4) The parties to the collective agreement were the Respondent and the Newspaper Guild of Detroit, a labor organization (R. 2-5). The latter was not a party to this action. Petitioner, and his assignors, were and are employees of Respondent, and were members of the Newspaper Guild of Detroit at the time the Respondent engaged in the activities complained of in the state court action (R. 3-4).

Respondent's conduct, allegedly constituting a breach of contract, consisted of permitting its nonunion employees (in the Editorial Department, Business Office and Advertising Department) to work full time during a strike by another labor organization at Respondent's plant, while Petitioner (and his assignors) were not permitted to work at all, or only part time (R. 4).

Petitioner claimed that he and his assignors were laid off, or not employed full time, solely because of their membership in the Guild, and this was said to be a discrimination forbidden by Article IV, Section 5, of the aforesaid collective bargaining agreement, reading as follows (R. 4, 21):

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild."

Petitioner in his state court action sought to recover money damages, the measure of which was the pay he and his assignors would have received under their individual employment contracts had they been employed full time (R. 4-5, 21). No other relief was prayed for.

After the case was at issue and pre-trial proceedings had been completed (R. 21-23), Respondent moved to dismiss the action for lack of jurisdiction on the grounds that Petitioner charged Respondent with acts which, if true, constituted an unfair labor practice as defined in the National Labor Relations Act, as amended (hereinafter sometimes referred to as "the Act"); and the National Labor Relations Board had exclusive jurisdiction of the subject matter of Petitioner's claim (R. 11).

For the purpose of this Motion it was stipulated that Respondent was engaged in commerce within the meaning of the Act (R. 9). Petitioner and his assignors did not file a complaint with the National Labor Relations Board, nor did anyone on their behalf (R. 10, 25). This action was commenced after the limitations period provided by the Act for filing an unfair labor practice charge had expired (R. 1, 4).

After a hearing on Respondent's motion the trial court dismissed the action for lack of jurisdiction (R. 9-20). On appeal to the Supreme Court of Michigan, it was conceded that the conduct alleged as constituting a breach of contract would also constitute an unfair labor practice under the Act. The Supreme Court affirmed the court below without dissent (R. 23-36). 362 Mich. 350.

SUMMARY OF ARGUMENT

This appeal demonstrates the wisdom of the Court's remark in an earlier case that the doctrine of federal preemption "can be rendered progressively clear only by the course of litigation." *Weber* v. *Anheuser-Busch*, 348 U. S. 468, 480, 481. And, the manner in which that doctrine has developed, case by case, likewise makes it clear that it is unwise for counsel to indulge in sweeping generalities as a

solution to the new and different problems presented by this case.

In our view this case presents for the first time two issues fundamental to the interpretation and administration of the Labor Management Relations Act as a whole. In a sense they are interrelated, as will be seen from the argument, although involving different sections of the Act. In the context in which these issues arise, the problem may be simply stated. The answers are, however, by no means as simple.

The first issue is the jurisdictional and substantive scope of § 301(a). Petitioner's brief does not address itself to this problem at all. It simply assumes that this is a case within the purview of § 301, and proceeds from there to the discussion of a number of matters which are irrelevant to the issue.[1] This action is not and could not have been within the purview of § 301(a). It is a common law action by Petitioner, an individual employee, for back pay under an individual employment contract allegedly due because of a claimed breach of a labor contract between Respondent (his employer) and a labor organization, not a party to this action. Whichever of the opinions we follow in *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U. S. 437, none would sanction § 301 jurisdiction in this case. Likewise, with due humility considering the great debate that surrounds the meaning of *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, that case clearly did not unseat *Westinghouse*, nor do its implications necessarily reach this case.

The cases principally relied on by Petitioner, *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, and others decided at the

[1] Brief of Amicus Curiae (hereinafter referred to as "AB") also assumes this to be a suit within the purview of Sec. 301 (a), except for a brief discussion at p. 11, n. 9, which is not much more than a flat assertion that this is so.

last term, held that in a suit within the purview of §301(a) of the Labor Management Relations Act 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, is not relevant. That holding is, of course, accepted. However, none of these cases, in our view, considered or decided the instant issue inasmuch as each was premised on an acknowledged §301(a) jurisdiction or was considered by the Court to be within the scope of that section of the Act. By contrast, this action can not be forced into the §301(a) mold for two reasons, it is between an individual employee and his employer and it is a suit to enforce "the uniquely personal right" of an employee to receive compensation. *Westinghouse*, 348 U. S. at p. 461. Although not directly passed on heretofore, the inference is plain from prior decisions of this Court that it would regard such an action as outside the scope of §301(a). The issue has been posed in numerous lower court cases and almost without exception the holding has been that such actions are not within that section.

The importance of the above is that if this case is not within the purview of §301 it must fall in an area where Congress did not legislate but "left to the usual processes of the law", in which event a state court would be free to apply its own state law and its own concepts of contract law. An employee has always been able to enforce his individual rights under a labor contract, at least in Michigan. In such cases we can perceive no federal question jurisdiction which would permit this Court "to resolve and accommodate such diversities and conflicts" as may arise. *Dowd Box*, *supra*, 368 U. S. at 514. If this be the case, and with a conceded unfair labor practice present, Federal pre-emption should most certainly be invoked, whether state power be derived from the contract or otherwise.

This is not an arbitration case. We are not here concerned with the enforcement of a contract to arbitrate (which is within the purview of § 301(a) and hence subject to review by the federal courts), nor with the withdrawal of arbitral jurisdiction, nor with what the Court said in cases such as *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, relative to the policy of Congress favoring the settlement of industrial disputes by arbitration. This is a common law action, to which the Michigan court (and every other state court) will be free to apply its own legal concepts, irrespective of "federal labor law". Viewed in this light, we believe Congress had quite definite intentions that no such jurisdiction should exist.

The issue of Federal pre-emption, if this should be deemed a § 301 case, we approach with some hesitancy, considering the broad language in *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, and *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, concerning the relevancy of the pre-emption doctrine in § 301 cases. However, we are convinced from a reading of the opinions, and the briefs filed and oral arguments made to this Court in those cases, that there were there involved many factors not present here, including conduct or activity only arguably subject to the Act and for which the Board provided no appropriate remedy. This case, by contrast, presents the issue of pre-emption simply and directly because it involves not only a conceded unfair labor practice (if the allegations of the declaration are true) but further the Board can provide the same relief requested of the state court. These differences we feel demand presentation of the pre-emption issue in our brief and argument—even though by doing so we may

risk the displeasure of the Court in argui question which some may think has already been decide..

No matter how Petitioner's brief seeks to mask the issue by its constant reference to conduct "arguably" subject to the Act that also is a breach of contract, recognition of his position will result in direct collision and inevitable conflict between the Board, to which Congress committed primary and exclusive jurisdiction over unfair labor practices, and the state courts. The "centralized administration of specially designed procedures * * to obtain uniform application of its substantive rules" by the Board, as contemplated by Congress, cannot help but be impaired. Further, this concurrent and independent jurisdiction will be possible of creation by the simple expedient of contract language requiring the parties to abide by the terms of § 8 of the Act, or to obey the law. With due deference to the language of the Court regarding Federal pre-emption vis-a-vis contract enforcement under § 301(a) in *Dowd Box* and *Lucas Flour*, we cannot believe that those cases were intended to reach this situation. Simply because Congress rejected a proposed amendment to the Act making the breach of a collective bargaining agreement an unfair labor practice, and its stated preference that such matters be left to "the usual processes of the law," does not evidence an intent to permit encroachment on the long established and well recognized jurisdiction of the Board over § 8 cases. We recognize, of course, that such a contract does not foreclose Board action, *if it is invoked*. The point is that the aggrieved party need not go to the Board within the time prescribed by the Act, but may, within the varying state limitations periods (six (6) years in Michigan), choose another forum to act on the same conduct under the guise of contract and secure the same relief, back pay; or he

may likewise sue his union if there are § 8(b) undertakings in the contract. To sanction such litigation will hardly contribute to industrial peace.

ARGUMENT

I.

WHERE CONDUCT IS CONCEDEDLY AN UNFAIR LABOR PRACTICE WITHIN THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD AN INDIVIDUAL EMPLOYEE SHOULD NOT BE PERMITTED TO SUE IN A STATE COURT BECAUSE IT IS ALSO A BREACH OF CONTRACT.

This case presents for the first time a narrow issue of importance in the administration of the national labor laws. We are not here concerned with conduct "arguably subject" to the Labor Management Relations Act, but conduct which, if proven, is concededly within the Board's classic jurisdiction and for which it could provide the self-same remedy as is prayed for in the state court.[2] We are not concerned with contract language extraneous to that of the National Labor Relations Act, requiring interpretation as to the intent of the parties, for the contract provision in this case simply paraphrases the language of the Act (as Petitioner concedes) and does no more than had the parties simply agreed to abide by the terms of § 8(a) (3) of

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[2] As Amicus concedes (AB 16, n. 15), the measure of relief granted, whether by the state court or the National Labor Relations Board, would be substantially the same in this case. Neither Petitioner nor Amicus argue that Respondent's conduct in this case, if proven, would not have constituted an unfair labor practice under Sec. 8 (a) (3) of the National Labor Relations Act. Both admit that the Petitioner (and his assignors) could have gone to the National Labor Relations Board. Further, the Board, this being a "discrimination" case, would have been required to give it priority in handling pursuant to Sec. 10(m) of the Act, as amended. Title 29 U.S.C. § 160(m) 72 Stat. 945, 73 Stat. 544. Amicus admits that Petitioner did not file an unfair labor practice charge against Respondent, and would now be barred from doing so (AB 3, n. 3). Instead this suit was commenced in the state court after six-months period had expired for the filing of an unfair labor practice charge with the Board.

the Act.[3] It is a startling proposition to us that by such a simple expedient an individual employee can gain a choice of forum in which to sue either an employer or a labor organization for what by any name is an unfair labor practice.[4]

At the risk of repetition, the rule in *Garner* v. *Teamsters Union*, 346 U. S. 485, 490, is again set forth:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid [those] diversi-

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[3] Both Petitioner and Amicus admit that the sole provision of the collective bargaining agreement between Respondent and the Guild relied on by the Petitioner simply paraphrases the language of Sec. 8 (a) (3) of the Act. As Amicus says (AB 3, n. 3): "Section 8 (a) (3) of the National Labor Relations Act ** makes it an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." By comparison, Art. IV, Sec. 5 of the collective agreement relied on by Petitioner provided that: "There shall be no discrimination against any employee because of his membership or activity in the Guild (a labor organization)" (R. 4). This does no more than paraphrase Sec. 8 (a) (3) of the Taft-Hartley Act and Sec. 8 (3) of the Wagner Act, as those sections have been construed by the Court and the Board. *Associated Press* v. *Labor Board*, 301 U.S. 103, 132; *Radio Officers* v. *Labor Board*, 347 U.S. 17, 42 et seq.

[4] Provisions prohibiting discrimination by the employer, the union or both are not uncommon in collective agreements. Dunau, *"Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 68-69. "The Employer's promise covers substantially the same ground as sections 8 (a) (1) and (3) of the NLRA, and the union's promise much the same ground as section 8 (b) (1) (A)." Hence, in cases like this, Petitioner's argument realistically viewed would provide a choice of forum for the grievant which cannot help but encourage "forum shopping" and discourage "centralized administration ** to obtain uniform application of its substantive rules", directly contrary to the purpose attributed to

> ties and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The practical effect of Petitioner's argument is self-evident. No longer will the Board be the primary and exclusive tribunal for the application of the rules laid down by Congress in § 8 of the Act. No longer will its "particular procedures" necessarily apply. No longer will the limitations period prescribed by Congress in the Act for the filing of charges necessarily control. Instead the limitations periods provided by the various states (in Michigan six (6) years) may govern. This is all true because a plaintiff may according to Petitioner, characterize conduct which constitutes an unfair labor practice as a contract violation, and thereby circumvent the plain mandate of Congress that jurisdiction of such matters be vested primarily and exclusively in the National Labor Relations Board. We do not debate the fact, nor need we, that such a contract provision bars access to the Board. It does not. But, it most certainly *affects* the jurisdiction of the Board to remedy unfair labor practices by creating a new and different

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Congress in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491. Where a collective agreement, such as this, simply borrows the language of the Act or merely incorporates it by reference, a court, if it has jurisdiction, must determine under guise of breach of contract whether an unfair labor practice has been committed. The trial court may, and probably will (through ignorance, if for no other reason), apply a different rule than the Board, which has traditionally handled Sec. 8 "discrimination" cases to the exclusion of the trial courts, state or federal. The fact that this concurrent independent jurisdiction can be created by "private" choice of the parties (assuming "litigation" to be a choice) should condemn the practice rather than support it. The employee's "right" in this case is one of the new and distinctive rights which Congress created and gave exclusive jurisdiction to the Board to enforce. Limitation or restriction of that right by private agreement should not be encouraged.

[5] Sec. 609.13, Michigan C.L., 1948. Quoted supra, under Statutes.

forum which an individual may choose for various and sundry reasons—political and otherwise—to sue the parties to a labor contract, be it employer or labor organization. The National Labor Relations Board acts only upon charges filed, it may not act *sua sponte* upon unfair labor practices. The rule suggested by Petitioner is obviously conducive to conflict.

A.

THIS ACTION IS NOT WITHIN THE PURVIEW OF SECTION 301 (a).

Petitioner's argument, by its reliance on *Dowd Box* and related cases decided at the last term assumes that this action is within the purview of § 301(a) of the National Labor Relations Act.[6] This ready assumption without discussion seems to us to be without foundation in the decisions of this Court, or of the lower courts which have considered the question. Petitioner is an individual employee seeking back-pay pursuant to an individual employment contract, for an alleged breach of a collective bargaining contract to which he was not a party. The Union, which was a party to the collective agreement allegedly breached, is not a party to this action and seeks no relief, nor does Petitioner on its behalf. Thus, this action is even further removed from the scope of § 301(a) than was *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, where a majority of the Court held that a union might not sue on behalf of its members for compensation allegedly due them by reason of the breach of a collective

[6] Section 301(a) (Title 29 U.S.C. 185) provides that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

bargaining agreement. The conclusion reached by the majority in that case was that Congress did not intend by § 301(a) to confer on the courts jurisdiction to enforce such rights. Nothing was found in the statute or the legislative history of the Act justifying the vesting of such power in the federal courts. The dissenting opinion would have recognized the standing of the union to sue, but it also concurred with Mr. Justice Reed's analysis of federal labor law as related to § 301(a). His opinion concluded that (348 U. S. at 462):

> "• • • § 301, by granting federal jurisdiction over actions between employers and unions on collective bargaining contracts, *does make breaches of them by either of those parties actionable.*" (Emphasis ours.)

and (348 U. S. at 463-464):

> "• • • Congress by § 301 has manifested its purpose to vest jurisdiction over breaches, *to a certain extent*, in the federal courts. Whether the rules of substantive law applied by the federal courts are derived from federal or state sources is immaterial. The rules are truly federal, not state. The cause of action for breach of contract is thus a cause of action arising under federal law, the source of federal judicial power under Art. III of the Constitution." (Emphasis supplied.)

Textile Workers Union v. *Lincoln Mills*, 353 U. S. 448, expressly distinguished *Westinghouse* and did not overrule it. The majority, adopting Mr. Justice Reed's reasoning in *Westinghouse*, did hold that § 301(a) authorized a suit by a union to enforce specific performance of an agreement to arbitrate, and that "• • • the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." (353 U. S. at

456). We find nothing in *Lincoln Mills* which would extend the jurisdictional scope of § 301 to include suits by individual employees to enforce "uniquely personal rights."[7] (348 U. S. at 461)

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[7] The concurring opinion of the Chief Justice (joined by Mr. Justice Clark) in *Westinghouse*, stated that the legislative history of Section 301 (a) was not sufficiently clear to indicate that Congress intended to thereby authorize a union to enforce in a federal court the "uniquely personal right" of an employee for whom it had bargained to receive compensation for services rendered his employer. 348 U.S. at 461. In *Lincoln Mills*, the majority opinion expressly distinguished *Westinghouse*. 353 U.S. at 456 n. 6, saying:

> "*Westinghouse* . . . is quite a different case. There the union sued to recover unpaid wages on behalf of some 4,000 employees. The basic question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it made with the employer."

Mr. Justice Burton (with Mr. Justice Harlan) in their opinion in *Lincoln Mills*, concurring and dissenting in part, agreed that the trial court had jurisdiction because (353 U.S. at 460):

> "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union **."

Lincoln Mills, despite the above, has been the subject of much comment including speculation as to whether *Lincoln Mills* did or did not overrule *Westinghouse*. Bickel & Wellington, *"Legislative Purpose and the Judicial Process: The Lincoln Mills Case,"* 71 Harv. L.R. 1; Note, *The Supreme Court, 1956 Term*, 71 Harv L.R. 85,173 et seq.; Gregory, *"The Law of the Collective Agreement,"* 57 Mich. L.R. 635; Bunn, *"Lincoln Mills and the Jurisdiction to Enfroce Collective Agreement,"* 43 Va. L. Rev. 1247.

Despite this speculation concerning *Lincoln Mills* the lower courts have uniformly applied the distinction and refused enforcement of "uniquely personal rights"; *United Steelworkers* v. *Pullman-Standard*, 241 F 2d 547 (CA 3); *Allied Oil Workers* v. *Ethyl Corp.*, 301 F 2d 104 (CA 5); *Woodward Iron Co.* v. *Ware*, 261 F 2d 138 (CA 5); *Sheppard* v. *Cornelius*, 302 F 2d 89 (CA 4); *General Drivers* v. *Riss*, 298 F 2d 341 (CA 6); *United Steelworkers* v. *New Park Mining Co.*, 273 F 2d 352 (CA 10); *Local Lodge, Machinists* v. *Servel*, 269 F. 2d 692 (CA 7), cert. den. 361 U. S. 884.

Petitioner's argument (B. 7, 12-20)* is primarily based on certain cases decided at the last term, all of which were held to be within the purview of § 301(a). *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502; *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17; *Local 175, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95; and *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238. Since his argument is confined to the question of federal pre-emption, we find no discussion but simply an assumption that this case is likewise within § 301(a) of the Act. No such assump-

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* Amicus brief likewise assumes that this an action within the purview of Section 301 (a), excepting for a brief discussion in a footnote (AB 11, n. 9). There it is simply said that since the contract sued on is one "between an employer and labor organization representing employees in an industry affecting commerce" the suit is controlled by federal, and not state law. We are given no reasons for this flat assertion. It is obviously contrary to our understanding of *Westinghouse*, *Lincoln Mills*, and every lower court case with which we are familiar. It is then said that this is not a *Westinghouse* case anyway because the provision sought to be enforced—banning discrimination on account of union membership—affects the union as well as the individual employees. This ignores the fact that this a suit for back pay by an employee, that the Union is not a party (and its position is not known), no relief is sought on its behalf and it would not share in any recovery. We know of no case supporting such a theory. All are to the contrary. As was said in *Sheppard* v. *Cornelius*, 302 F 2d 89, 91 (like this case, a suit by individual employees for breach of a collective agreement):

> "Here, the employees' representative, if there is one, is not a party to these actions. The Mine Workers are not here contending that they have a contract with the employers which the employers have violated. Jurisdiction under Sec. 301 of the Labor Management Relations Act, to adjudicate claims by or against a labor organization representing employees does not extend to the claims of two employees asserting in their own names individual rights to additional compensation under a contract which they claim to be applicable.
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> "Individual rights, individually asserted, though stemming from a collective employment agreement and solely dependent upon it, cannot be enforced under Sec. 301 of the Labor Management Relations Act. If there is substance in the rights asserted by these employees, the rights may be enforced through *traditional actions brought in the state courts*. There is no federal jurisdiction to enforce them." (Emphasis ours)

tion is warranted. We find no relevance to our issues, pre-

emption or otherwise, in *Lion Dry Goods.*[9] *Dowd Box* teaches that a state court does have jurisdiction, concurrently, with the Federal courts over suits within the purview of § 301(a). The Court likewise there made it plain that the rule in *Garner,* quoted above, p. 12, withdrawing from the states jurisdiction over controversies *arguably subject* to the jurisdiction of the National Labor Relations Board did not apply with respect to the enforcement of collective agreements under § 301(a).[10] This left unanswered the two questions presented by this case. What of the suit not within the purview of § 301(a) and does a state court have jurisdiction over conduct *concededly* subject to the Board's jurisdiction simply because the conduct also constitutes a breach of contract?

Lucas Flour was obviously a suit within the purview of § 301(a), it being an action by the employer against a union for breach of an implied no strike clause in a collective bargaining agreement. The Washington court there held that

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[9] *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, discussed by Petitioner (B. 14) sheds no light on our Section 301 problem, it being an action clearly within that Section to enforce an arbitration award. *Lincoln Mills*, supra; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564. The question of Federal pre-emption was neither raised nor discussed. However, where the action is within Section 301 (which is not the case here) there are cogent reasons why Federal pre-emption should not apply (except where there is a clear conflict. Judicial action under Section 301 is reviewable by this Court and diversities and conflicts may be thus corrected. Where the action, as here, is not within Section 301 it is not in our view subject to such review for the reasons hereinafter stated. Moreover, the peculiar attributes of the arbitral process justify its use even tho matters arguably subject to the Board's jurisdiction ar considered by the Arbitrator. The same is not true of a state court for the reasons hereinafter discussed.

[10] In this case we are not concerned with so-called "peripheral" or "penumbral" aspects of the Board's jurisdiction as in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, or with a case where the Board will not act as in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, or with a situation where the Board cannot give relief as in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656. Here the conduct complained of, if proven, is within the Board's traditional jurisdiction and it can grant the same relief as is asked of the state court.

it was not divested of jurisdiction by § 301. This Court, for the reasons set forth in *Dowd Box*, agreed (369 U. S. at 101). The Court then held that since it was a § 301 type action, the Washington court was not free "to decide this controversy within the limited horizon of its local law" (369 U. S. at 102), but that "incompatible doctrines of local law must give way to principles of federal labor law" (369 U. S. at 102). Again, because of an argument based on Federal pre-emption, the Court restated its position in *Dowd Box*, saying 369 U. S. at 101, n. 9):

> "Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant . . . ."

The question in the case at bar therefore remains unanswered by *Lucas Flour*: i.e., what of suits not within the purview of § 301(a)?

In *Atkinson*, an employer sought damages from a union and certain individual employees, alleged to be agents of the union, for breach of a no-strike clause in a labor contract between the union and the employer. Jurisdiction of the action against the union was based on § 301, and against the individual employees on diversity. The Court ordered the action against the individuals dismissed on the merits, since under § 301, officers and members of a union acting for the union, cannot be individually liable for breach of a contract, when the union itself is liable for such breach. 370 U. S. at 247. In answer to the union's pre-emption argument, the Court again noted that it being a § 301 suit, the doctrine was inapplicable, citing *Lucas Flour* 370 U. S. at

245, n. 5. The Court was not required to consider whether an individual is entitled to sue under § 301(a), nor was it faced with a conceded unfair labor practice.

We are convinced from a review of these decisions that in the present state of the law, and absent a reversal of *Westinghouse*, a suit by an individual employee for compensation by reason of the breach of a collective bargaining contract is beyond the grant of jurisdiction in § 301(a). Nor would the reversal of *Westinghouse* necessarily reach this case. It is one thing to permit a union to sue on behalf of its members, and quite another to open the doors of the federal courts to suits by individual employees regardless of the amount involved or diversity but simply because the suit involves a labor contract affecting commerce.

Mr. Justice Frankfurter in *Westinghouse*, as one ground for holding the union's action on behalf of its members beyond the intendment of § 301(a), noted that (348 U. S. at 460):

> "* * * such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter, and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts."[11]

[11] Citing numerous state court decisions. 348 U.S. at 460, n. 29.

The lower federal courts have been confronted on numerous occasions with an individual employee's claim that § 301(a) gave the district courts jurisdiction over his action against an employer, a union or both; or of a union's action on his behalf. Virtually, without exception these decisions have held an individual employee's action or claim not within the purview of § 301(a).[12] Although we do not intend to burden the Court with any detailed discussion of these cases, they do furnish a frightening insight into the problems which would result from such a broadening of the scope of § 301(a).

In *Dimeco* v. *Fisher*, 185 F Supp. 213 (D. NJ 1960), in remanding to the state court an individual employee's action against his employer for wrongful discharge and against his labor union for failure to properly represent him, the district court held that it was without jurisdiction

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[12] *United Protective Workers* v. *Ford Motor Co.*, 194 F 2d 997 (CA 7, 1952); *United Electrical R. & M. Workers* v. *General Electric*, 231 F 2d 259 (CADC, 1956); *Copra* v. *Suro* (CA1, 1956) 236 F. 2d 107; *Silverton* v. *Valley Transit Cement Co.*, 249 F 2d 409 (CA9, 1957); *Adams* v. *International Brotherhood*, 262 F 2d 836 (CA10, 1968); *International Brotherhood* v. *Morrison-Knudsen*, 270 F 2d 530; *United Packinghouse Workers* v. *Wilson & Co.*, 80 *F Supp.* 563 (ND Ill., 1948); *Schatte* v. *International Alliance*, 84 F Supp. 669 (SD Calif., 1949) aff'd on other grds. 182 F. 2d 158 (CA9) cert. den. 340 U.S. 340 U.S. 828; *Mackay* v. *Loew's Inc.*, 84 F Supp .676 (SD Calif. 1949), aff'd on other grds. 182 F 2d 170 (CA9), cert. den. 340 U.S. 828; *valeski* v. *Local 401*, 91 F Supp. 552 (NJ, 1950); *John Hancock Mutual Life Ins. Co.* v *United O. & P. Workers*, 93 F Supp. 296 (NJ, 1950); *Brooks* v. *Hunkin-Conkey Const. Co.*, 95 F Supp. 608 (WD Pa, 1951); *Waialua* v. *United Sugar Workers*, 114 F Supp. 243 (Hawaii, 1953); *Ketcher* v. *Sheet Metal Workers*, 115 F Supp. 802 (Ark. 1953); *Silverton* v. *Rich*, 119 F Supp. 434 (SD Calif., 1954); *Disanti* v. *Local 53*, 126 F Supp. 747 (ED Pa., 1954); *Local Union No. 420* v. *Carrier Corp.*, 130 F Supp. 26 (ED Pa., 1955); *Holman* v. *Industrial Stamping*, 142 *F Supp.* 243 (Hawaii, 1953); *Katcher* v. *Sheet Metal Workers*, 115 F Supp. 423 (Mass., 1957); *United Steelworkers* v. *New Park Mining Co.*, 160 F Supp. 107 (Utah, 1958), aff'd on this grd., 273 F 2d 352 (CA10); *Dimeco* v. *Fisher*, 185 F Supp. 213 (NJ, 1960); *Allen* v. *Armored Car Chauffeurs Union*, 185 F Supp. 492 (NJ, 1960); *Consolidated Laundries* v. *Craft*, 185 F Supp. 631 (SD NY, 1960); *Burgos* v. *Waterman Steamship Co.*, 189 F Supp. 683 (Puerto Rico, 1960); *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 191 F Supp. 288 (ED Pa, 1960); *Frin* v. *DeLuca*, 194 F Supp. 852 (ED NY, 1961). Contra: *Isbrandtsen Co.* v. *International Longshoremen*, 204 F 2d 495 (CA3, 1953), (Dictum). Cf. Ann., 99 L Ed 467, 538; 17 A.L.R. 2d 614, 619.

under § 301(a). Noting the statement in *Westinghouse* (quoted supra, p. 20) that Congress did not intend to flood the Federal courts with such litigation, the court said (185 F Supp. 215):

> "• • • If so, Congress surely did not intend to flood the Federal courts with the even greater number of cases which would be brought, not by Unions for the benefit of their many individual employees, but by any and all individual employees on their own behalf, and either for their pay, or to prevent their discharge.
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> "This case is indeed a clear example of the need for limiting suits to those between Unions and employers. Here the Union took the grievance of the plaintiff up to, but not including, the arbitration stage. The Union decided, after careful consideration, that the employer had been correct in its action and that the grievance should not be taken to arbitration. If § 301(a) were to allow the individual to then come into Federal Court, whenever he was disgruntled at the decision of the Union not to arbitrate, the flood of litigation would indeed be overwhelming."

These are not reasons of expediency advanced by the courts, but have a solid foundation in the legislative history of § 301 which shows that Congress was acutely aware of the problem. Thus, the House Minority Report on Sec. 302 (predecessor of § 301) said in part (Appendix, *Lincoln Mills*, 353 U. S. at 520):

> "• • • It is feared that the result would be to involve the Federal courts, already overburdened, with a great mass of petty litigation over amounts less than $3,000, easily capable of being adjudicated effectively by the more numerous State

> courts. This type of action would undoubtedly invite the return of conditions in the Federal Courts during prohibition days, when they bogged down in litigation ordinarily handled by the average police court."

Although, "The legislative history of § 301 is somewhat cloudy and confusing," as *Lincoln Mills* observed, one point appears to be crystal clear and that is that Congress, in its consideration of § 301 and its predecessor bills, did not intend to extend that Section beyond the parties to the labor contract, i. e., the employer and the labor organization, as regards suits under § 301. Individual employee actions for breach of contract were apparently never contemplated. The legislative history relied on by the majority in *Lincoln Mills* is sufficient to support this conclusion, and the appendix to that case, setting forth the entire legislative history of § 301, reinforces this view. The overriding concern of Congress was to provide a forum where unions could sue and be sued as legal entities, but as *Lincoln Mills* notes (353 U. S. at 453):

> "• • • there was also a broader concern—a concern with a procedure for making such agreements enforceable in the courts *by either party.*" (Emphasis ours.)

And, quoting from the Senate and House Reports (353 U. S. at 454):

> "Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' (S. Rep.) As stated in the House Report, "• • • the new provision 'makes labor organizations equally responsible with employers for contract violation and *provides for suit by either against the other in the United States district courts.*'" (Emphasis ours.)

§301, appearing under Title III (significantly entitled **"Suits by and Against Labor Organizations"**), provides that "Suits for violation of contracts between an employer and a labor organization • • • may be brought in any district court of the United States having jurisdiction of the *parties* • • • " (Emphasis ours) The legislative history constantly refers to the *parties*. By "parties" Congress meant the parties to the labor contract, not employees or strangers to such a contract. Mr. Case made this clear in hearings on his bill (which contained provisions similar to § 301) when he said (353 U. S. Appendix at 490):

> " • • I do not think it would extend to individual members of the union, because the language is that the contract is made 'mutually and equally binding and enforceable against each of the *parties* thereto,' and under the Wagner Act *the party to the contract is the recognized bargaining agent.*" (Emphasis supplied)

Congress did make sure that individual employee-members of a union would not be liable for money judgments by § 301(b). The only other consideration given individual employees seems to have been a proposal, which was rejected, to make them liable where they participated in a "wildcat" strike.[13]

The only way of bringing an employee within the ambit of §301(a) is by construing the term "between an employer and a labor organization" as modifying the word "contracts" and not "suits." This would sweep into the federal courts every suit, regardless of amount or diversity, involving such a contract. The legislative history clearly supports no such construction, and the vast majority of courts di-

[13] Appendix to *Lincoln Mills*, 353 U.S. at 495; Amendment No. 3, amending H.R. 4908, subsection (d).

rectly faced with the problem have held, and properly so, that the term modifies both "suits" and "contracts." cf. note 12, supra.[14]

Where Congress intended in the Taft-Hartley Act to give rights to or create obligations binding on "employees," it said so, yet there is no mention of "employees" in § 301(a). And when rights were given others to sue, Congress expressly said so, as in § 303(b) of the Act.[15]

B.

THIS ACTION NOT BEING WITHIN THE PURVIEW OF SECTION 301 (a), THE STATE COURT WOULD BE FREE TO APPLY STATE LAW SUBJECT TO NO REVIEW BY THE FEDERAL COURTS.

If this is not an action within the purview of §301(a), and we believe it is not for the reasons stated, the question remains whether the state court in this case would be required to apply "Federal labor law," and whether its decision would be subject to review by a Federal Court.

We approach this question with the understanding that *Lincoln Mills* established that §301(a) is more than jurisdictional. As the Court there said (353 U. S. at 456):

> "• • • We conclude that the substantive law to apply in suits under § 301(a) is federal law, which

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[14] In the brief of Amicus Curiae, the above argument is swept aside with the flat assertion that this is a §301 suit because the contract sued on is one "between an employer and a labor organization." (AB, 11, foot note 11). This is not very illuminating, and is certainly contrary to the views of the Chief Justice, Justices Frankfurter, Minton, Burton, Clark and Reed in *Westinghouse*, the majority in *Lincoln Mills*, as well as Justices Burton and Harlan in their separate opinions in that case.

[15] Section 303(b) (Title 29, U.S.C. § 187(b)) in pertinent part reads as follows:

> "Whoever shall be injured in his business or property by reason •• (of) any violation of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title (§ 301 of the Act) •••"

> the courts must fashion from the policy of our national labor laws."

Likewise, at the last term, *Dowd Box* and *Lucas Floor*, made it clear that state courts are not divested of jurisdiction of suits within the purview of § 301(a), but that such concurrent jurisdiction must be governed by the following principle. (*Lucas Floor*, 369 U. S. at 103):

> "The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount *in the area covered by the Statute*. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by §301 to be decided according to precepts of federal labor policy." (Emphasis Supplied)

From the above, it is clear that suits within the purview of §301(a), whether commenced in a state or federal court, are to be controlled by federal labor law, subject ultimately to review by this Court. But the question remains, what of the suit which is not within the purview of §301(a), as to which Congress did not intend to legislate?

Again resort must be had to *Lincoln Mills* for some basic premises. We know from that case (with the added light cast by *Lucas Floor* and *Dowd Box*), that, be it a state or "federal" rights and that "It is not uncommon for federal "federal" rights and that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned." (353 U. S. at 457) Also, that there is no constitutional difficulty because "Article III, § 2, extends the judicial power to cases 'arising under . . . the Laws of the United States . . . . . '. The power of Congress to regulate

these labor-management controversies under the Commerce Clause is plaint. * * * A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article III" (353 U. S. at 457).

This still leaves unsolved the question—what federal "rights" and what substantive content did Congress intend in § 301(a). The solution of this question is complicated by the fact that on its face § 301 is jurisdictional and does not attempt to define or delimit the nature of the substantive rights created. As *Lincoln Mills* observed, "The range of judicial inventiveness will be determined by the nature of the problem." (353 U. S. at 457). But we would not assume from this that the Court intended the judicial power to exceed legislative boundaries.

Our prior review of what has been deemed to be beyond the scope of § 301(a) plainly points to the conclusion that Congress was concerned solely with, and only with, the enforceability of contracts by and between the parties thereto, i.e., an employer and a labor organization, and with their peculiar collective rights. A "federal" right to sue was given each. No significant discussion appears in the legislative history supporting a conclusion that § 301 was intended to regulate or affect an individual employee's right to sue or to create for him a "federal" right to sue or be sued.

Congress did not in § 301(a) exhaust its Commerce power over the subject matter of labor contracts, as Mr. Justice Reed observed in *Westinghouse* (348 U. S. at 463,464):

> ". . . Since the contract entered into through provisions of the Labor Act creates rights over which Congress has legislative authority, a breach of the contract is likewise within its power. Congress

by § 301 has manifested its purpose to vest jurisdiction over breaches, *to a certain extent*, in the federal courts." (Emphasis ours)

The *limited extent* of congressional action referred to is, of course, the limitation of § 301(a) to suits between employers and labor organizations on contracts between them, (or between labor organizations) (348 U. S. at 462). His opinion further made it clear that his reasoning (later adopted by the Court in *Lincoln Mills*) as to the substantive law to be applied in § 301 actions "*will be pertinent in cases which are deemed to have been properly brought under that section . . .*" (348 U. S. at 461) (Emphasis ours).

Murky as the legislative history of § 301 may be, it clearly supports the holding of the Chief Justice (joined by Mr. Justice Clark) in *Westinghouse* that it was not " • • sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation. • • • " 348 U. S. at 461. *A fortiorari* this would include an individual employee's right to sue for back pay. There is no indication that Congress was at any time in its consideration of § 301 (or its predecessors) concerned with any thing other than the contractual rights of the employer and the union (the parties to the contract), and the mutual enforcement of those rights. Primarily, as every one agrees, Congress was concerned with the enforcement of no-strike clauses against unions. *Lincoln Mills*, 353 U. S. at 453 and n. 4. These mutual collective rights have been uniformly interpreted since *Lincoln Mills* as being restricted to matters of "peculiar concern" to the parties, e.g., the union's right to enforce the agreement to arbitrate which it made with the employer in *Lincoln Mills* as contrasted with *Westinghouse* where the

Union sued to enforce individual rights of its employee-members. 353 U. S. at 456, n. 6.[16] This difference is epitomized in a case relied on by Petitioner (B 16, n. 2) in support of his pre-emption argument. *United Steelworkers* v. *New Park Mining Co.*, 273 F 2d 352 (CA 10).[17] In that case,

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[16] *Copra* v. *Suro*, 236 F 2d 107 (CA 1); *Zdanok* v. *Glidden*, 288 F 2d 99 (CA 2); *United Steelworkers* v. *Pullman-Standard*, 241 F 2d 547 (CA 3); *Sheppard* v. *Cornelius*, 302 F 2d 89 (CA 4); *Woodward Iron Co.* v. *Ware*, 261 F. 2d 138 (CA 5); *General Driver's Union* v. *Riss*, 298 F 2d 341 (CA 6); *Local Lodge, Machinists* v. *Servel*, 268 F 2d 692, cert. den. 361 U.S. 884 (CA 7); *Silverton* v. *Valley Transit Cement*, 249 F 2d 409 (CA 9).

[17] In *New Park Mining* (cited in *Lucas Flour*, 369 U.S. at 101, n. 9 in support of the proposition that the preemption doctrine is not relevant in Sec. 301 cases) the Tenth Circuit held that the district court had jurisdiction of a suit to compel arbitration of a union claim that the employer had discharged employees, ceased operations and leased out the work to former employees for the purpose of avoiding its labor contract with the union. The employer's defense was that the termination of the contract was an unfair labor practice and within the exclusive jurisdiction of the National Labor Relations Board. Disposing of this contention the Court of Appeals said (273 F 2d at 357-358):

> "But our case does not involve any conflict between state and federal remedies, or private and public remedies. Rather we are concerned only with the exclusiveness of *two federally created rights or remedies in the same legislative scheme, i.e., the Labor Management Relations Act*. Section 301 of the Act is concerned with violations of contracts between an employer and a labor organization representing employees, the enforcement of which Congress left to the usual processes of the law' ***
>
> "The remedies for unfair labor practices under the Act were committed exclusively to the Board, but the Board's jurisdiction in that regard is limited to the effectuation of the purposes of the Act itself. The Board is not concerned with the enforcement of labor contracts between employer and Union representatives of employees ***."

By contrast, the Tenth Circuit refused jurisdiction of the claims of the individual employees who had joined in that suit to recover back wages and vacation pay because of the employer's conduct. In that respect the Court said (273 F 2d at 355):

> "* * * But fereral court jurisdiction thus conferred [by § 301(a) and (b)] has been restricted to contract violations of 'peculiar concern' to the Union as an organization, such as agreements to arbitrate wages, hours and conditions of employment ***; and to the enforcement of collective awards made pursuant to arbitration of grievances arising out of the labor contract. ***. Federal jurisdiction does not extend to the enforcement of rights which are 'uniquely personal' to the employees, such as back wages and vacation pay."

Hence, a common law suit such as this by individual employees in a state court for back pay is not a federally created "right," nor is it part of the "same legislative scheme" as suits within the purview of § 301 (a). Its accommodation with the exclusive jurisdiction of the Board over unfair labor practices, as suggested by the Tenth Circuit, cannot be justified on any such basis.

the court carefully distinguished between the rights of the employer-plaintiffs to recover accrued back wages and vacation pay (273 F 2d at 355) and the right of the union to enforce arbitration of a dispute even though it involved an unfair labor practice (273 F 2d at 357-358). The rights of the employees, even tho related to the unfair labor practice, the court held were not within the purview of Section 301 and beyond the jurisdiction of the Federal courts.

If the argument is to be accepted that Federal law controls all litigation involving labor contracts affecting commerce, then Congress did not act "*to a certain extent*," but to its fullest extent under the Commerce Clause. Petitioner's argument assumes that it did (as does Amicus), despite the lack of evidence in the legislative history of § 301 and its predecessor bills, that Congress had any such intention. It is Petitioner's burden, not ours, to establish such jurisdiction, and not by flat assertion.

We do know that when Congress considered and acted on § 301 (and the predecessor bills) it was well briefed on the then available judicial means of enforcing labor contracts in the various states. It was known that employees had always been able to enforce their individual rights in state courts applying state law (as was the case in Michigan).[18] The rejection of the Senate proposal making a breach of a labor contract an unfair labor practice cognizable by the Board, left enforcement to "*the usual processes of the law.*"[19] To the extent that, and on whatever theory, an individual employee was then able to enforce labor contracts in the state courts we can only presume

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[18] *Westinghouse*, cited, 348 U.S. at 460 and n. 29; *Cortez* v. *Ford Motor Co.*, 340 Mich. 108, 64 NW 2d 523.

[19] See H.R. Conference Report No. 510, 80th Congress, 1st Sess., p. 42, U.S. Code Cong. Service, 1947, p. 1147.

that Congress by this statement intended to leave untouched these traditional means of enforcement.[2] An individual employee's suit in 1946 and 1947 was not one enforcing a "federal" right, nor was it "usually" subject to federal law.

Encroachment on the traditional jurisdiction of state courts to apply their own legal concepts in employee actions should not be lightly inferred, no matter how compelling or desirable "the need for a single body of federal law." Unless there is clear evidence that Congress so intended, the simple jurisdictional grant of § 301(a) over suits between employers and labor organizations should not be extended to imply displacement of local law in suits outside its purview. Or put another way, the application of federal substantive law should be coextensive with the jurisdictional grant of § 301(a), and no more. This construction of a statute, which is at the very best ambiguous, is consistent with the Court's " * * * deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a board reading of jurisdictional statutes." *Romero* v. *International Terminals*, 358 U. S. 354, 379.

As we know from *Dowd Box* and *Lucas Flour*, state courts in § 301 actions must apply federal labor law in the exercise of their concurrent jurisdiction with the federal courts over suits coming within the purview of that section. This ruling renders academic consideration of prior state court cases

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[2] Since the jurisdictional and substantive scope to be given § 301 concerns federalism and the division of federal and state judicial powers, before finding that Congress by § 301 (a) intended a complete displacement of state law governing collective bargaining agreements, this statement by Senator Ferguson might again be considered (quoted in full in *Dowd Box*, 368 U.S. at 512):

> "Mr. Ferguson. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts ***all the present rights of the State Courts to adjudicate*** the rights between parties in relation to labor agreements . . . . " (Emphasis supplied).

where there arose a question as to the substantive law to be applied—state or federal.[21]

In the converse case, where the suit is outside the scope of § 301(a), those courts which have considered the question have clearly indicated that state common or statutory law governs, not federal labor law. This has been true both of state and federal courts.[22] The latter have faced this prob-

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[21] *Lucas Flour*, 369 U.S. at 102 (n. 10) noted that, "Of the many state courts which have assumed jurisdiction over suits involving contracts subject to § 301, few have explicitly considered the problem of state versus federal law." However, of those that did, as the Court notes, most held that federal law should govern. *McCarroll* v. *Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 60, 315 P. 2d 322, 330 (Employer granted injunction by state court against Union's violation of a no-strike clause in a labor contract. Cf. *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, and Dissenting Opinion at p. 226); *International Ass'n. of Machinists* v. *Cessna Aircraft Co.*, 186 Kan. 569, 352 P. 2d 420 (suit by Union against Employer to enforce arbitration agreement); *Harbison-Walker Refractories Co.* v. *United Brick & Clay Workers* (Ky.), 339 S. W. 2d 933 (§ 301 type action for enforcement of an arbitration award). In *Karcz* v. *Luther Mfg. Co.*, 338 Mass. 313, 155 N.E. 2d 441, 444 (an action by individual employees), the court, although finding it unnecessary to choose between state and federal law there being no apparent conflict, expressed doubt as to whether § 301 was applicable at all (in which case federal law would not control); *Springer* v. *Powder Power Tool Corp.*, 220 Or. 102, 348 P. 2d 1112, (like *Karcz*, an action by individual employees, resolved the question of applicable substantive law in the same way); *Clark* v. *Hein-Werner*, 8 Wisc. 2d 264, 100 N. W. 2d 317, to the same effect. These latter cases, although considering federal decisions, reflect serious doubt as to whether Federal law is controlling in a non-301 case.

[22] *Federal*: *Sheppard* v. *Cornelius*, 302 Fed. 2d 89 (CA 4); *Allied Oil Workers* v. *Ethyl Corp.*, 301 Fed. 2d 104 (CA 5); *General Drivers Union* v. *Riss*, 298 Fed. 2d 341 (CA 6); *Zdanok* v. *Glidden*, 288 Fed. 2d 99 (CA 2); *Communications Workers* v. *Ohio Bell Telephone Co.*, 265 Fed. 2d 221 (CA 6), cert. den. 361 U. S. 814; *Woodward Iron Co.* v. *Ware*, 261 Fed. 2d 138 (CA 5); *International Ladies Garment Workers* v. *Jay-Ann Co.*, 228 Fed. 2d 632, 633-636 (CA 5); *United Shoe Workers* v. *Brooks Shoe Co.*, 191 Fed. Supp. 288 (E. D., Pa.); *Allen* v. *Armored Car Chauffeurs Union*, 185 Fed. Supp. 492 (N. J.); *Dimeco* v. *Fisher*, 185 Fed. Supp. 213 (N. J.); *Silverton* v. *Rich*, 119 Fed. Supp. 434 (S. D., Calif.); *Waialua Agr. Co.* v. *United Sugar Workers*, 114 Fed. Supp. 243 (Hawaii).

State: *Bridges* v. *McGraw & Co.* (Ky.), 302 S. W. 2d 109; *Masetta* v. *National Bronze Co.* (Ohio App.), 107 N. E. 2d 243, rev'd. on other grds., 159 Ohio St. 306, 112 N. E. 2d 15; *Jenkins* v. *Schluderberg*, 217 Md. 556, 144 A. 2d 88; *McLean Dist. Co.* v. *Brewery & Beverage Drivers*, 254 Minn. 204, 94 N. W. 2d 514, cert. den. 360 U. S. 917; *General Bldg. Contractors Ass'n.* v. *Local Unions*, 370 Pa. 73, 87 A. 2d 250; *Coleman Co.* v. *International Union*, 181 Kan. 969, 317 P. 2d 831 (Compare with *Local Lodge No. 774, Int'l. Ass'n. of Machinists* v. *Cessna Aircraft*, 186 Kans. 569, 352 P. 2d 420, cited *Lucas Flour*, 369 U. S. at 102, footnote 10).

lem many times in applying *Westinghouse*, as modified by *Lincoln Mills*, to suits by a union seeking to enforce "uniquely personal rights" and in actions by individual employees, the union not being a party. In this latter category, their reasoning is typified by *Sheppard* v. *Cornelius*, 302 Fed. 2d 89, 91 (CA4), where it was said:

> "Here, the employees' representative, if there is one, is not a party to these actions. The Mine Workers are not here contending that they have a contract with the employers which the employers have violated. Jurisdiction under § 301 of the Labor Management Relations Act, to adjudicate claims by or against a labor organization representing employees does not extend to the claims of two employees asserting in their own names individual rights to additional compensation under a contract which they claim to be applicable.
>
> "Individual rights, individually asserted, though stemming from a collective employment agreement and solely dependent upon it, cannot be enforced under § 301 of the Labor Management Relations Act. If there is substance in the rights asserted by these employees, the rights may be enforced through traditional actions brought in the state courts. There is no federal jurisdiction to enforce them."

Reflecting the reasoning of the state courts, the Kentucky Court of Appeals said in *Bridges* v. *F. H. McGraw & Company*, 302 S. W. 2d 109, 113:

> "Therefore, it seems to be the proper interpretation of the opinion [in *Westinghouse*] and to be the conclusion of the Supreme Court, as the logical converse (since a union may not maintain such a suit for its members in a federal court), that individual employees may maintain a common law action in a state court to recover alleged unpaid wages due them

on contracts of hire made under or by virtue of a collective bargaining agreement executed under the provisions of the National Labor Relations Act. We so hold."

This Kentucky case should be compared with another Kentucky case — *Harbison-Walker Refractories Co.* v. *United Brick & Clay Workers*, 339 S. W. 2d 933 (cited in *Lucas Flour*, 369 U. S. at 102, n. 10)—where the same court considered itself bound to follow federal labor law in a Section 301(a) type action.

Our conclusion from the above is that in this case where individual employees are suing in the state court to assert their "uniquely personal right" (not a federal "right") to compensation due to an alleged breach of a collective bargaining agreement, there is no federal jurisdiction under 301(a) and no federal question presented which would empower this Court to review a decision of the Michigan court if it is permitted to act. It follows that the state court would be free to proceed "to dispose of this litigation exclusively in terms of local contract law," unlike *Lucas Flour*, 369 U. S. at 102, and that a Federal court acting in the premises, jurisdiction being based on diversity and jurisdictional amount, would be required to follow such local contract law pursuant to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.[23]

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[23] If federal courts, entertaining an employee's suit on the basis of diversity and necessary jurisdictional amount (Title 28, U.S.C., §1332 (a)), were to apply substantive law other than that of the state in which the court sits, the serious constitutional problems noted in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, would appear to arise.

C.

THE PRIMARY, EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD PRE-EMPTS AND EXCLUDES STATE COURT JURISDICTION IN THIS CASE.

A proper approach to the question of Federal pre-emption and its relevancy to this case requires consideration of exactly what is here involved. If this is not a suit within the purview of § 301(a), and we believe it is not for the reasons previously set forth, then it is beyond the Federal question jurisdiction of this Court to review. That being the case, the key reasoning in *Dowd Box* supporting concurrent state and Federal court jurisdiction under § 301(a) would be lacking, since this Court would not be in a position to "resolve and accommodate . . . the diversities and conflicts" which might arise by reason of the state court's independant exercise of its common law jurisdiction. *Dowd Box*, 368 U. S. at 514. Absent such opportunity for review, the potential, indeed probable, conflict with decisions of the National Labor Relations Board in the same area clearly justifies pre-emption of the Michigan court's jurisdiction and recognition of the Board's exclusive jurisdiction. We perceive no valid argument to the contrary. Petitioner and Amicus in their briefs, assuming as they do that this is a § 301 action, advance none.

However, assuming *arguendo* that this case is within the purview of § 301(a), there still remain compelling reasons why Federal pre-emption should apply. There is here presented for the first time to our knowledge asserted state court jurisdiction over conduct concededly subject to the National Labor Relations Board's traditional jurisdiction as to which the Board was empowered to grant the same

relief as the state court.[34] Not only is the remedy parallel but, likewise, the state court, at least in theory, would apply the same substantive law to the cause of action that has been developed by the Board in unfair labor practice proceedings under § 8(a)(3). This is so because the state court, although acting under the guise of breach of contract, must interpret contract language which simply paraphrases the statutory language of the Act, defining unfair labor practices and more particularly § 8(a)(3). There is in reality no basic difference between the contract provision relied on here and one which does no more than incorporate that Section of the Act by reference. In either case it is equally clear that the contracting parties have merely restated, by reference or otherwise, a statutory obligation.[34a] That being

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[34] Thus Brief of Amicus (n. 15 at p. 16) concedes that relief would be substantially the same, and recognizes that it was agreed in the Court below the action alleged as constituting a breach of contract would also constitute an unfair labor practice under Section 8(a)(3) of the Act (AB, 3 and n. 3).

[34a] Section 8(a)(3) of the National Labor Relations Act (29 U.S.C. 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Amicus concedes (AB, 17, 18 footnote 17) that if a collective bargaining agreement merely adopted "as such a wide range of obligations imposed by the National Labor Relations Act, but provided judicial remedies ***, it could perhaps be urged with some force that the parties were attempting to frustrate the congressional policy of providing an exclusively administrative remedy for the statutory obligations".

This is exactly our case, except that the contract provision involved does not contain a "wide range of obligations", only one. This is also our argument. To attempt to attribute to the provision against discrimination some meaning other than has been developed by the NLRB under §8 (a)(3) of the Act is to ignore the practicalities of collective bargaining and assume that the parties possessed a degree of sophistication that is totally unrealistic. By the contract provision the parties did no more than agree to obey the law, specifically §8 (a)(3). This is not an unusual bargaining request despite its seeming superfluity. But to say that the parties by such a provision "are prescribing their own *substantive code of conduct* for the treatment of employees" (AB 18, n. 17) is, we believe, totally unrealistic. The only "substantive code" possibly contemplated by the parties is that developed by the National Labor Relations Board under §8 (a)(3) and its predecessor section of the Wagner Act, and this would be the only point of reference for a court attempting to enforce such a provision.

the case, the state court (and jury), were it to hear the case on the merits would have no point of reference as to the substantive law to be applied other than the Board's decisions.[25]

This is indeed a novel proposition to state courts which have in the past uniformly and almost without exception deferred to the exclusive competence of the Board in all actions (including breach of contract) involving an unfair labor practice.[26] Reflecting this uniform respect for the Board's expertise in this area, the Ohio court in a contract case remarked:

> "... Unfair labor practices, as defined by Section 8 of the National Labor Relations Act, are the most distinctive new rights and duties created by the Act, the enforceability of which is confided to the National Labor Relations Board to the exclusion of any and all State courts. ...
>
> "... While the National Labor Relations Board's jurisdiction is not expressly made exclusive, we assume that it is exclusive as to all those unfair labor practices that were created by the Act."

General Electric Co. v. *UAW-CIO*, 93 Ohio App. 139, 108 N.E. 2d 211, 219-220.

The total impact of Petitioner's argument should be fully understood. If recognized in the context of this case it will establish that the Board's jurisdiction over unfair labor practices as defined in § 8 is not exclusive, and that every state and federal court has the power to act in this area

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[25] As Amicus puts it in its brief (pp. 24, 25) "... the State court would be obliged to decide it in accordance with principles of federal labor law, in the ascertainment of which it will, of course, look to decisions of the Board."

[26] *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322; *Holman* v. *Industrial Stamping Co.*, 142 Fed. Supp 215 (ED. Mich.) indicate the confusion which could result if the Board's primary jurisdiction is not recognized.

where there is a labor contract within the purview of § 301 (a). Further, that this may be done at the suit of an individual employee, the union not being a party to the action or its position known. No showing need be made of any prior recourse to the Board, and the Board will have no standing before the court. Its views, except as the court may try to decipher them in reported decisions, will not necessarily control.

All of this is accomplished by use of the magic term "contract," which by some alchemy transforms the "unfair labor practice" into something else which trial courts are free to act on. We are in this respect reminded of the language of the Chief Justice in his dissenting opinion in *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 632:

> "The majority draws satisfaction from the fact that this was a suit for breach of contract, not an attempt to regulate or remedy union conduct designed to bring about an employer discrimination. But the presence o sence of pre-emption is a consequence of the effec of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading."

The label "breach of contract" should not be permitted to frustrate federal regulation and national policy.[27] That is

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[27] The reasoning which we believe should be adopted in this case is that suggested by the late Judge Parker in his opinion in *Textile Workers* v. *Arista Mills*, 193 F d 529 (CA 4). That case did not involve a contract provision prohibiting an unfair labor practice by the employer, as does this case. The Court of Appeals there ordered enforcement of a strike settlement agreement, at the suit of a union, which reinstated striking employee on certain conditions, even though the employer's conduct, which was the subject of the agreement, was both a breach of contract and an unfair labor practice. 193 F 2d at 534. However, the opinion made this significant statement (193 F 2d at 533):

> "We do not mean to say that, merely because a bargaining contract may forbid unfair labor practices, the courts have jurisdiction to

exactly what is accomplished here if the courts are permitted to directly invade the area of § 8 rights and duties. Unless we misunderstand the prior decisions of the Court, the National Labor Relations Board has been since its inception the "paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining," and prior to the Labor Management Relations Act, 1947, was the sole agency determining rights made enforceable by the Act, to the exclusion of the Federal trial courts.[2] In fact, it is the Board, subject to judicial review, which has developed the entire body of law governing the peculiar and distinctive body of rights and obligations comprised in Section 8 of the Wagner Act, as amended by the Taft-Hartley Act. We do not understand that the 1947 Act was intended to affect this primary exclusive jurisdiction over unfair labor

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afford relief against them under guise of relieving against breaches of contract. • • • We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Relations Board."

cf. also *United Packinghouse Workers* v. *Wilson & Co.*, 80 F. Supp 563 (D. Ill.); *Local 774, IAM* v. *Cessna Aircraft Co.*, 341 P. 2d 989, 994 (Kans. Sup. Ct.); *"Jurisdiction of Arbitrators and State Courts over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice,"* Note, 69 Harv. L.R. 725 (1956).

The cases bearing on the general question of Federal pre-emption are gathered in Petitioner's Brief at pp. 16-17, n. 2, and will not be repeated here.

For the reasons hereinafter stated we do not quarrel with those decisions upholding jurisdiction under § 301(a) despite the involvement of an unfair labor practice where the suit is one by a union to compel arbitration as in *United Steelworkers* v. *New Park Mining*, 273 F 2d 352 (CA 10). Nor, for the reasons set forth in 1, A and B of our brief, do we believe that this suit by an individual employee is controlled by those cases where the union brings the action and it is within the purview of § 301, as is true of most of the cases cited by Petitioner.

[2] H Rep. No. 447, 74th Cong. 1st Sess., p. 24; S. Rep. No. 573, 74th Cong. 1st Sess., p. 15; *Meyers* v. *Bethlehem Corp.* 303 U.S. 41, 48; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265; *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 364; *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 168 Fed. 2d 182, 186 (CA 4).

practices,[29] excepting only in those few instances where Congress gave limited jurisdiction to the federal or state courts, or both, over such practices, as in § 10 (j), § 10 (l), and § 303.[30] In no other instance did the Act confer jurisdiction upon state or federal courts to deal with unfair labor practices. Thus in § 303 Congress expressly granted concurrent jurisdiction over suits against labor organizations where their conduct came within the prohibited area of § 8 (b)(4) of the Act. This would imply that Congress intended that other types of actions charging labor organizations with different unfair labor practices were excluded. This does not follow at all if Petitioner's argument is accepted. For under his version of § 301 (a) (which does not even mention unfair labor practices by reference or otherwise) an individual employee would be perfectly free to sue his union, or a union to which he does not belong, in any state or federal court for what is concededly an unfair labor practice under § 8 (b). This *tour de force* is accomplished as in the present case by the simple insertion in

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[29] We find nothing in the legislative history of the Senate Bill characterizing breaches of labor contracts as "unfair labor practices," and vesting jurisdiction in the Board and the Federal district courts which indicates an intention to reach "unfair labor practices" under guise of breach of contract. Its subsequent rejection, which left enforcement of collective agreements to the "usual processes of the law," does not appear to evidence an interest to diminish or permit encroachment on the Board's jurisdiction by the courts under guise of breach of contract. S. 1126, Sec. 8 (a)(6) (employer), Sec. 8 (b)(5) (union), 80th Cong. 1st Sess.; H.R. 3020, Sec. 8 (a)(6) (employer), Sec. 8 (b)(5) (union), 1 Legislative History of the Labor Management Relations Act 1947 (G.P.O.) pp. 111, 114, 239, 241, 426, 429, 474, 545; 2, op. cit., p. 982.

[30] Thus, § 10 (j) (Title 29, USC § 160 (j)) gives the Board under certain circumstances the right to petition the United States district court for temporary relief where an unfair labor practice has been committed.

§ 10 (l) (Title 29, USC § 160 (l)) the Board in § 8 (b) (4) (A) (B) or (C) (Title 29, USC § 158 (b)) cases is given the authority to petition the United States district court for appropriate injunctive relief against the unfair labor practice.

§ 303 (Title 29 USC § 187) gives any person the right to sue in a state or federal court when he has been injured in his business or property by a boycott, which may also be a violation of § 8 (b) (4).

labor contracts (as is often done) of a provision paraphrasing the statutory language of or incorporating by reference § 8 (b)(1)(A).[31]

The issue, as we view it, is therefore quite narrow, despite the importance of its implications. This case clearly falls within that class of cases where "Obvious conflict, actual or potential, leads to easy exclusion of state action." *Weber* v. *Anheuser-Busch*, 348 U.S. 468, 490.

Petitioner's principal reliance is on two cases decided at the last term—*Dowd Box Co.* v. *Courtney*, 368 U. S. 502, and *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95. The factual basis for the holding in those cases was such that the question which this case poses could not have arisen, although the principle there stated is admittedly broad enough to reach this case. In *Dowd Box*, pre-emption was at best a secondary argument by Petitioner, if it was argued at all.[32] The conduct which was there alleged to be "arguably" subject to the Board's exclusive jurisdiction was Petitioner's refusal to bargain with Respondent. There was no contract provision at issue such as in this case, and although Petitioner's alleged refusal to bargain might have been within the jurisdiction of the National Labor Relations Board, that agency was powerless to grant the relief sought by Respondent in the Massachusetts court, i.e., specific enforcement of the labor contract negotiated

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[31] Dunau, *"Contractual Prohibition of Unfair Labor Practices Jurisdictional Problems,"* 57 Col. L. R. 52, 68, 69.

Section 8 (b)(1)(A) (Title 29, USC §158(b)) provides that "It shall be an unfair labor practice for a labor organization (1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 of this title ***."

[32] *Dowd Box Co.* is discussed in Petitioner's brief at pp. 12-14 and in brief of Amicus, p. 10; *Lucas Flour Co.* is discussed by Petitioner at pp. 14-18, by Amicus, pp. 8-9.

Petitioner's brief in *Dowd Box*, pp. 21-26. Petitioner in *Dowd Box* agreed with Petitioner in this case that Federal pre-emption did not apply to a Sec 301 case, which in his view was limited to the Federal courts.

by the parties. *Labor Board* v. *Insurance Agents Union*, 361 U.S. 477. Nor was the Massachusetts court, as is the case here, called upon to determine under guise of contract whether Petitioner had committed an unfair labor practice. However, the Court did, in *Dowd Box*, reject the pre-emption doctrine, as announced in *Garner* v. *Teamsters Union*, 346 U. S. 485, 490-491, as support for Petitioner's argument that Congress had restricted suits to enforce contracts under Section 301 of the Labor Management Relations Act to the Federal district courts.

In this connection the Court also noted that Congress had expressly rejected the policy announced in *Garner* with respect to violations of collective agreements by rejecting a proposal to make the breach thereof an unfair labor practice, and instead deliberately left their enforcement to "the usual processes of the law." 368 U. S. at 513.

Lucas Flour did not involve an unfair labor practice. In a state court action by an employer against a union for damages for business losses due to breach of an implied no strike clause, the union raised as one defense that its strike was either arguably protected under Section 7, or prohibited by Section 8 of the Act. This, it was argued, gave the National Labor Relations Board primary jurisdiction to determine whether the strike was protected or prohibited, and excluded the state court's power to act. The Washington court held that Federal preemption as set forth in *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, did not apply because the union's conduct was not arguably protected or prohibited by the Act. This Court held that the state court had jurisdiction, applying Federal law pursuant to Section 301 of the Labor Management Act, even though the union's activity was arguably protected by Section 7 of

the Act. In this connection, the court pointed out (369 U. S. at 101, n. 9) that the pre-emptive doctrine of cases such as *Garmon*, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant where the suit is for violation of a collective bargaining contract within the purview of § 301(a). So that again, assuming this to be a § 301 type action, although the facts in *Lucas Flour* do not reach this case, the broad principle there stated apparently does.

In *Lucas Flour* the Court did add this statement (369 U. S. at 101, n. 9):

> "* * * It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N. L. R. B. to remedy unfair labor practices, as such."

We respectfully submit that our case demonstrates the manner in which court enforcement of a contract obligation can affect the jurisdiction of the Board to remedy unfair labor practices, as such, in those instances where, as here, the contract obligation simply restates the statutory obligation. In such a case, the individual employee has the choice of proceeding against either party to the contract (if both assume obligations) in a state court or before the Board. Since the Board does not act *sua sponte* but only on charges filed, the option is entirely the employee's, subject to no control by the Board. If the Board's jurisdiction is not invoked, before the statutory period for filing charges has elapsed, then there is no recourse to the Board, and a decision adverse to the employee is not subject to review by the Board. The Board is powerless to find (as Amicus suggests,

AB. 25) that such decision was contrary to Board principles and provide its own remedy. This choice of forums where there is an unfair labor practice alleged likewise neatly circumvents the limitations period provided by Congress in Section 10(b) of the Labor Management Relations Act.[33] Congress approved this provision (there was none in the Wagner Act) over the heated objections of the minority, and with the obvious purpose of requiring the prompt settlement of disputes.[34] This purpose is most certainly frustrated if an aggrieved employee may, as he could have done in this case, wait six (6) years (the Michigan limitation period on contract actions)[35] to commence an action against his employer or union. In *Anson* v. *Hiram Walker & Sons;* 222 F. 2d 100 (CA 7), cert. den. 350 U. S. 840, after remand, 248 F. 2d 380, where the employees (their claim involving an unfair labor practice), as was the case here, failed to file charges with the National Labor Relations Board within the statutory period, the Court of Appeals dismissed their action, saying (248 F. 2d 381):

> "*** To hold that plaintiffs have exhausted their administrative remedies, when the record discloses that, by their own neglect, they have failed to avail themselves of those remedies within the statutory period, would put to naught the limitation provisions of the Act and substitute a rule not provided by Congress to the effect that the suit must be entertained in spite of the fact that by their own acts they deprived themselves of their right to invoke their administrative remedies."

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[33] Title 29, USC § 160 (b). Quoted in full under Statutes, supra.

[34] Minority Rep. No. 105, PT 2, n. S. 1126, 1 Legislative History of the Labor Management Relations Act 1947 (GPO) 467; Remarks of Senator Wagner, Cong. Rec., 2 op. cited, 998; Remarks of Senator Murray, Cong. Rec., 2 op. cited, 1455.

[35] §609.13, Compiled Laws of Michigan, 1948. Quoted in full under Statutes, supra.

In cases such as this, the approach most consistent with the policies of the Act and its coherent enforcement is to require individual employees to file charges with the Board, and to exhaust the grievance machinery including arbitration, if provided, of the collective agreement, before resorting to "legal warfare," *Anson* v. *Hiram Walker & Sons*, cited, 222 F. 2d at 103. Where the grievance on its face charges an unfair labor practice, to encourage litigation without resort to the Board is to bypass remedies expressly created by Congress, and to circumvent the plain mandate of Congress that jurisdiction of such matters be vested exclusively in the Board. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50. Where, as here, the Board remedy is adequate, and the Board is required to act if there is merit to the charge, we can perceive no good reason why individual employees should be encouraged to litigate in the courts without any showing of prior resort to the Board or the grievance machinery of the contract. We simply do not follow argument of Amicus (AB 18) that requiring prior resort to the Board would result in added expense, inconvenience and delay where the grievance on its face, as in this case, charges an unfair labor practice. Processing such a charge certainly involves no great expense, and as to the delay and inconvenience, the congestion of our state court dockets certainly matches that of the Board's. If no unfair labor practice is found by the Board, then a state court should be foreclosed from acting in any event, where, as here, the contract provision does no more than paraphrase an unfair labor practice.

It is argued that the parties by their collective agreement "chose" the state court as a forum for the enforcement of this obligation, and that this is an agreed upon procedure for enforcing them (AB. 13 et seq.). It is urged that to con-

fine Petitioner to his remedies before the Board would defeat the contractual expectations of the parties (AB. 17). These arguments not only ignore realities but encourage the decentralization of the administration of the substantive rules which Congress entrusted to the Board in the Wagner Act and the Taft Hartley Act. This contract spells out no procedure whatsoever for the enforcement of obligations. There is no "chosen" forum. Except for the fact that contracts are generally enforceable in the courts—provided that the grievance machinery established by the contract has been exhausted—there is absolutely no basis for the inference that the parties (one of whom, the union, is not a party to this case) intended that a state trial judge should sit to determine, under guise of breach of contract, whether an unfair labor practice has been committed. It is at least equally fair to assume that the parties by incorporating a statutory obligation, intended that the Board should and would remedy such conduct. At the time this contract was negotiated no state court to our knowledge had ever taken jurisdiction of a conceded unfair labor practice under guise of breach of contract. Illogical as it may seem, the parties during collective bargaining often request that a statutory obligation, e.g. recognition of the union as exclusive bargaining agent, or a provision against discrimination such as this, be inserted—a request that is usually readily acceded to because it is thought to do no more than require a party to obey the law. The argument with regard to "contractual expectations" and "confining the Petitioner to his remedies before the Board" in the context of this case can have no other purpose than to encourage "forum shopping" and "diversities and conflicts." It necessarily implies that Petitioner should have the right to choose the state court or Board depending on which he believes will give him a

better reception. Since the conduct involved here is an unfair labor practice, whether we call it "contract breach" or by its proper name, it is impossible to perceive how a "second-hand" reading of the Board decisions by a state court to determine whether Petitioner has been discriminated against because of union activity can help but create confusion, diversity and conflict. Nor is there any sound basis for Petitioner's attempt to differentiate between law "involuntarily" imposed, i.e., in tort and regulation by statute cases, and a common law breach of contract case. In either case, it is the state court which regulates, according to its own conception of the parties rights, by injunction or the award of damages, the conduct of the parties. Where litigation or "legal warfare" is suggested as a "chosen" forum for the resolution of a labor dispute which the Board is fully as capable of remedying, the suggestion accomplishes nothing but confusion and conflict.

By contrast, arbitration as it appears in most labor contracts is clearly a method of final adjustment agreed upon by the parties and one which Congress declared to be "the desirable method of settlement of grievance disputes." Section 203 (d) of the Act; *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 566. Arbitration is specifically mentioned as preferred method of settling labor disputes in Section 201 (b) of the Act. An arbitration clause in a contract does truly choose the forum, in some cases even the arbitrator is named. This Court made it clear in *Lincoln Mills* that Congress intended to place "sanctions behind agreements to arbitrate grievances." 353 U. S. at 456. The importance of the arbitral process was further emphasized in *United Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574, 578:

"A major factor in achieving industrial peace is

> the inclusion of a provision for arbitration of grievances in the collective bargaining agreements."

and, (at p. 58)

> "* * * the grievance machinery under a collective bargainin gagreement is at the very heart of the system of industrial self-government."

Cf. also *Drake Bakeries, Inc.* v. *Bakery Workers*, 370 U. S. 254, 263. The legislative history of Taft-Hartley shows an acute awareness of the desirability of adjusting grievances through the grievance machinery (including arbitration) provided by a labor contract before resorting to economic or legal warfare. Voluntary arbitration is a different process than litigation, which has very little to recommend it as a means of settling labor disputes.

We have no intention of unseating the arbitral process in this case—indeed it is not involved here except for the fact that both obligations spring from the contract. Despite any seeming illogic in permitting an arbitrator to act and not a state court, we do not urge that an arbitrator be excluded from acting where an unfair labor practice is involved. There are several reasons for this. There are nearly always strict limitations timewise on the processing of grievances to and through arbitration. Consequently a party to the contract—be it the union or the employer—is not faced with a state statute of limitations which may permit the grievance to fester for years before it becomes the basis of litigation. Arbitration is always a proper subject of enforcement and review under Section 301(a), and diversities and conflicts can be corrected by this Court. Common law litigation by an employee in a state court such as is the case here is not subject, in our opinion, to such review, for the reasons previously stated. The Board, as Amicus points out (AB 22-24), moreover, has since its earliest days

declined to exercise jurisdiction with respect to unfair labor practices which have been, or could have been, submitted to arbitration under the collective bargaining process. We know of no such policy of deferring to the jurisdiction of a state court. Indeed it is quite impossible, since once a state court's jurisdiction is recognized it is absolute. It is not required to defer to the Board. In fact it cannot be bound by a Board decision involving the same parties as *res judicata* does not apply in such cases.[36] Accordingly, once jurisdiction attaches over an unfair labor practice under guise of breach of contract, it cannot thereafter be disturbed except by review—which we believe to be limited to the state supreme court.

It is therefore our position that the proper and coherent administration of the National Labor Relations Act requires that the primary, exclusive jurisdiction of the National Labor Relations Board over unfair labor practices be recognized in this case, and that encroachment thereon be denied where, as here, a state court's jurisdiction is invoked under guise of breach of contract, seeking the same relief that could have been secured from the Board.

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[36] Further instances of the conflicts which will develop between the courts and the Board, if Petitioner's argument is fully accepted, are noted by Amicus (AB 25, n. 30). *Local 1505, IBEW* v. *Local 1836, IAM*, decided June 4, 1962, 50 LRRM 2337 (CA 1); *Portland Web Pressman's Union* v. *Oregonian Publishing Co.*, 286 F 2d 4 (CA 9), cert. den. 366 U.S. 912; *Modine Mfg. Co.* v. *Grand Lodge Ass'n. of Machinists*, 216 F 2d 326 (CA 6). In such cases Amicus urges that the courts defer to the judgment and expertise of the Board. We agree. Our point of disagreement apparently is that we also believe the expertise of the Board to be equally helpful where discrimination under Sec. 8(a)(3) is charged.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be affirmed.

Respectfully submitted,

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September 11, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 13

DOYLE SMITH, *Petitioner*

v.

EVENING NEWS ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The court below held that the subject matter of this suit is within the exclusive jurisdiction of the National Labor Relations Board, because the conduct alleged in the complaint as a violation of the collective bargaining agreement would also be an unfair labor practice under the National Labor Relations Act. The court relied primarily on this Court's decision in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and it rejected petitioner's argument that the preemptive doctrine of such cases as *Garmon* is not applicable to suits for violation of collective bargaining agreements. (R. 26-36.)

Petitioner's opening Brief, and the Brief *Amicus* for the United States, discussed only the issue dealt with by the court below, *viz.*, whether the *Garmon* preemption principles, and the considerations which underlie them, apply to judicial enforcement of collective bargaining agreements.

Respondent's Brief, however, discusses this question only

secondarily:[1] it principally undertakes to support the decision below by an entirely new line of argument.

Respondent's new chain of argument, as we understand it, is comprised of the following links: (1) *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 210 F. 2d 623 (6th Cir.), *aff'd*, 348 U.S. 437, holds that the "uniquely personal right of an employee" to wages may be enforced only in a suit by the individual employee, and not in a suit by the union under § 301(a). (2) The *Westinghouse* decision is still good law. (3) This is a suit on such a "uniquely personal right" of employees, and hence suit could not have been brought by the union under § 301(a). (4) Federal substantive law governs only as to suits on collective bargaining agreements which are or could have been brought by a union under § 301(a), that is, to suits within the jurisdictional purview of § 301(a). State substantive law governs as to a suit brought by individual employees on the "uniquely personal right of an employee" to wages, whether the suit be brought in a state court or in a federal court under diversity jurisdiction. (5) Since this Court cannot review state substantive law, the preemption doctrine of *Garmon* must be applied in suits on the personal rights of employees, in order to prevent "diversities and conflicts," even though the *Garmon* doctrine is not applicable to breach of contract suits within the jurisdictional reach of § 301(a).

Although this line of argumentation was not made to or considered by the court below, we take it that it may be urged here under the doctrine that a decision may be supported, though not attacked, on a ground not raised below.

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[1] Respondent discusses this issue in part C of its Brief, pp. 35-50, but does not as respects this issue raise any points not anticipated in our opening Brief. The preemption issue is fully discussed, and the case for preemption strongly argued, in Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. Rev. 411 (1962).

[2] We think it inapt, however, for respondent to complain (Br.

However, while we are awed by the ingenuity of counsel for respondent, we think that their chain of reasoning does not hang together. While their final contention (i.e., (5) above) might well be accepted if the preceding contentions on which it rests were sound, we think that all of those contentions are questionable and that some of them are wholly specious.

Instead of jumbling these contentions all together as respondent does, we will consider them one at a time. It is to be kept in mind that the whole chain breaks if any link is unsound.[3]

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p. 6) that our opening Brief and the government's Brief *Amicus* did not discuss these newly devised contentions.

[3] Respondent also argues (Br. pp. 20-25) that only a union, and not individual employees, may sue or be sued under § 301(a). However, this contention does not appear to be relevant even to respondent's line of argument; since according to respondent the reach of the federal substantive common law of collective bargaining depends on whether suit on the alleged contract violation in question could, as a matter of federal jurisdiction, have been brought under § 301(a), rather than upon whether the party asserting the claim would have had standing to sue under § 301(a).

Thus, as we understand respondent's position, it contends that state substantive law would control in the present case, because it involves the "uniquely personal right of an employee" to wages, even if the suit had been brought in the name of the union.

Accordingly, and since respondent's line of argument contains so many patent and fatal weaknesses, we have not addressed ourselves to the question whether individual employees may sue or be sued under § 301(a). However, we wish to call it to the Court's attention that *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, may hold adversely to respondent's contention on this point.

We have argued *infra* pp. 10-11, that *Atkinson* holds, in disposing of Count II of the complaint, which rested federal jurisdiction upon diversity of citizenship, that the reach of the federal substantive common law of collective bargaining is not limited by the jurisdictional reach of § 301(a). The opinion can be read, however, as holding, either alternatively or additionally, that Count II falls within federal jurisdiction under § 301(a). See 370 U.S. at 238, and especially note 6. On any reading the decision seems fatal to respondent's position.

1. *The holding of Westinghouse.* Respondent's argument rests initially on the proposition that in *Westinghouse* this Court held that the "uniquely personal right of an employee" (348 U.S. at 461) to wages may be enforced only in a suit by the individual employee, and not in a suit by the union.

There was no opinion of the Court in *Westinghouse*, and the justices making up the majority voted for affirmance on varying grounds. Thus, of the six justices comprising the majority, three (opinion of Justice Frankfurter, in which Justices Burton and Minton concurred) voted to affirm on the ground that, in order to avoid constitutional and other difficulties, § 301 (a) should be construed as not conferring jurisdiction on the federal courts over suits to recover wages allegedly due individual employees. These justices in effect held that § 301 (a) did not confer jurisdiction over the subject matter of the action. They did not say that only the employees, and not the union, could sue for wages under a collective bargaining agreement. Quite the contrary, the opinion by Justice Frankfurter expressed the view that (in an appropriate tribunal) "either or both" may sue.[1] The dissenting opinion of Justice Douglas, concurred in by Justice Black, likewise expressed the view that the union could enforce the claim. He declared (348 U.S. at 465–466):

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving

[1] The Justice said (348 U.S. at 459):

"• • • To hold that the union may sue, it is not necessary to hold that the employee may not sue in any forum, and vice versa. At least when the union and the employee are in agreement, there is no reason why either or both should not be permitted to sue. • • • When the employee and the union are in disagreement, the question is not which may sue, but rather the extent to which the one may conclude the other."

the construction and enforcement of the collective bargaining agreement."

Thus of the eight justices participating, five were of the view that the union could enforce the claim in an appropriate tribunal, though three of them thought the federal courts not an appropriate tribunal. Three other justices did express the view that only the employees, and not the union, could sue to enforce the wage provisions of a collective bargaining agreement. (See opinion of Warren, C. J., concurred in by Clark, J., and opinion of Reed, J.) But this was never the view of more than a minority of the Court.

2. *Present status of Westinghouse.* A majority of the justices in *Westinghouse* (i.e., Justices Frankfurter, Burton, Minton, Warren and Clark) did hold that § 301 (a) should not be construed as conferring jurisdiction on the federal courts over a suit to enforce the wage provisions of a collective bargaining agreement. This restrictive interpretation of § 301 (a) largely stemmed from the reluctance of these justices to have the federal courts undertake "to work out without more a federal code governing collective bargaining contracts." (Opinion of Frankfurter, J., 348 U.S. at 454.)

This reluctance began to crumble away with *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. Only Justice Frankfurter, dissenting, continued to protest against (353 U.S. at 465–466):

"The paradox of the *Westinghouse* decision is that although the action was dismissed for want of jurisdiction partly by the votes of Justices who deemed the right to sue "uniquely personal," the only point of law which commanded the assent of a majority was that the collective bargaining representative may sue in a proper forum if the employer fails to compensate his employees according to the collective agreement." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 603 (1956).

> "* * * the Court's attribution to § 301 of a direction to the federal courts to fashion, out of bits and pieces elsewhere to be gathered, a federal common law of labor contracts * * *."

In *United Steelworkers* v. *Warrior & Gulf N. Co.*, 363 U.S. 574, and companion cases, all of the members of the Court were agreed that substantive federal law controls as to the interpretation and enforcement of the arbitration provisions of collective bargaining agreements.

These decisions quite clearly undercut the rationale of *Westinghouse*. If, however, there remained any doubt that *Westinghouse* had been relegated to the dust bin of history, that doubt was removed by *Dowd Box Co.* v. *Courtney*, 368 U.S. 502. In that case suit was brought in a state court in Massachusetts by local union officers as representatives of the membership of the local. The union contended that certain negotiations with the company had eventuated in a legally binding collective bargaining agreement, while the company contended that its negotiators had acted without authority. The complaint asked for an order declaring the contract valid, and for a money judgment in conformity with the wage provisions of the agreement; and a final decree was entered awarding specific sums to named employees in the amounts which would have been paid them by the company if it had complied with the contract. (Record 93, 103.) [6]

Both in the Massachusetts courts and here the company argued that the suit was within the jurisdiction of the federal courts under § 301, and that the state courts therefore

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[6] The Company's brief in this Court states (p. 9) that "the final decree awarded only monetary damages," the other issues having become moot due to lapse of time.

had no jurisdiction over the controversy. This Court agreed that the suit was within the purview of § 301, but held that the state courts nevertheless had concurrent jurisdiction. In answer to the contention that diversities and conflicts would result from concurrent state court jurisdiction, this Court pointed out that "federal common law" would control, and declared (368 U.S. at 514):

> "* * * To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court."

It is thus quite clear that the present suit is within the jurisdictional purview of § 301, and that it is controlled by substantive federal law. The entire structure of respondent's argument thus collapses, even assuming, arguendo, the validity of respondent's further contentions that federal substantive law governs only as to suits which are or could be brought under § 301, and that as to suits not within the jurisdictional reach of § 301 the preemption principles of *Garmon* should therefore be applied in order

In *Board Box* the company also made an argument very like that advanced by respondent here. The company pointed out that the conduct charged to it constituted an unfair labor practice, i.e., a refusal to bargain; and it argued that, while there is an exception as to cases brought under § 301 to the preemption principles which would otherwise apply, this exception should not extend to suits brought in state courts. (Brief pp. 7, 21-26.) This Court did not advert to this argument.

After reviewing the decisions discussed above, Professor Summers concludes:

> "There may remain a thin shadow of possibility that such a suit could not be brought in the federal courts, but it now seems plain that union actions to enforce, either directly or through arbitration, terms of the collective agreement which are peculiarly for the benefit of the individual employee such as wages, seniority or discharge are governed by federal substantive law."

Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 372 (1962).

We agree as to the substantive, but fail to perceive the shadow.

to avoid diversities and conflicts which the Court would be powerless to resolve.

3. *Nature of the right asserted in this suit.* Even if respondent was correct in its contention as to what *Westinghouse* held, and even if that holding was still good law, the right here sought to be enforced is not "uniquely personal" to individual employees in the same sense as the right to be paid the agreed upon wages. The contractual provision against discrimination on account of membership or activity in the Guild is as much for the protection of the union as of individual employees. This provision, like many others in a collective bargaining agreement, has what Professor Cox called a "double aspect."[9] He analyzed it thus:

> "• • • An employer's promise not to discriminate against employees because of union activities belongs in the category of obligations benefiting the union as an organization, but the individual would seem to have the same kind of interest which he has in the ordinary obligation not to discharge without just cause." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 617, n. 24 (1956).[10]

Hence the claim here sued on might well be regarded as within the jurisdictional purview of § 301 even if respondent's contention as to *Westinghouse* were accepted.

4. *Reach of the federal common law.* Respondent argues that "the application of federal substantive law should be coextensive with the jurisdictional grant of § 301(a), and

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[9] That so many of the provisions of a collective bargaining agreement do have this double aspect is one of the reasons why the decision of the Court of Appeals in *Westinghouse* was practically untenable.

[10] Professor Meltzer similarly classifies a provision against discrimination for union activities as involving "a coalescence of individual and collective interests." Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 Col. L. Rev. 269, 272 (1959).

no more," (Br. p. 31). Even in a diversity case, respondent urges, state law must control, pursuant to *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, (unless § 301(a) jurisdiction could have been invoked). (Br. p. 34.)

This issue as to the scope of the federal common law becomes pertinent to the disposition of the case only upon acceptance of respondent's preliminary contentions, discussed above. We therefore doubt that the Court will find it necessary to consider whether the federal substantive law of collective bargaining extends beyond the jurisdictional reach of § 301(a).

It is our view, however, that the federal common law on collective bargaining does extend beyond the jurisdictional reach of § 301(a); and that it encompasses all issues as to the negotiation, interpretation, and enforcement of collective bargaining contracts, including issues which do not involve the "violation" of collective agreements, or are otherwise not within the jurisdictional range of § 301(a).

This broad reach of federal substantive law results, as a matter of legal theory, from the fact that the substantive body of federal common law on collective bargaining does not derive simply (or at all, except by implication) from § 301(a), but from other provisions of the Labor Management Relations Act, as amended, from the Railway Labor Act, and from various other sources. As this Court put it in *Lincoln Mills*, 353 U.S. 448, 456, the courts are to look to "the policy of our national labor laws."[11] While § 301(a) provided the most significant stimulus to the development of a body of federal common law on collective bargaining, some federal common law on that subject antedated the enactment of § 301. See, *e.g. Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192. We see no basis on which the reach of this

[11] See, generally, Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N.Y.U.L. Rev. 448 (1962).

law could be held to be limited to the jurisdictional range of § 301(a). See also *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232; *Sayres* v. *Oil Workers, Local 23*, 350 U.S. 892 (mem.); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330.

Further, in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 the Court explicitly rejected the contention that federal law controls only in suits within the jurisdictional reach of § 301 (a), and not in diversity cases. There the company sued for alleged breaches of the no-strike clause of a collective bargaining agreement. Count I undertook to state a cause of action against the international and local unions, and rested federal jurisdiction on § 301 (a). Count II undertook to state a cause of action against 24 individual employees, and rested federal jurisdiction on diversity. The Court of Appeals held that "Count II stated a cause of action cognizable in the courts of Indiana, and, by diversity, maintainable in the District Court."

This Court reversed. It said (370 U.S. at 245-246):

> "We are unable to agree with the Court of Appeals, for we are convinced that Count II is controlled by federal law and that it must be dismissed on the merits for failure to state a claim upon which relief can be granted.
>
> "Under § 301 a suit for violation of the collective bargaining contract in either a federal or state court is governed by federal law * * * and Count II on its in Count II is therefore within the scope of a 'violation of the no-strike clause * * *. The conduct charged in Count II is therefore within the scope of a 'violation' of the collective agreement."

Thus the substantive federal common law created by the Court in response to the jurisdictional grant of § 301 (a) applies to all issues as to violation of a collective bargain-

ing agreement, whether or not the suit could be brought in the federal courts under § 301 (a).[12]

The principle for which respondent contends would be utterly unworkable. To examine its practical consequences is to refute its validity.

According to respondent, rights running to or claims against a union as an entity under a collective bargaining agreement, including all suits by or against a union to enforce arbitration awards or the arbitration provisions of a contract, are within the purview, jurisdictionally, of 301 (a), and are therefore controlled by federal substantive law, whether suit is brought in state or federal court; but claims "uniquely personal" to the employees (unless asserted by the union via arbitration) are controlled by state law.[13]

Respondent's analysis would, if accepted, give rise to the following problems and difficulties:

(1) Uniform federal law would prevail as to rights running to or against a union, but rights personal to employees would be subject to the vagaries of state law.[14] States would even be free to adopt the conservative view of the Privy Council or the radical view of the late Dean Shulman that collective bargaining agreements should be treated

[12] A possible alternative or additional interpretation of *Atkinson*, but one equally fatal to respondent's overall position, is discussed in note 8 *supra*.

[13] Respondent declares (Br. p. 8) that "Congress had quite definite intentions" to this effect. As Justice Frankfurter said of a similar contention in *Westinghouse*, 348 U.S. at 456, "This is an excessively sophisticated attribution to Congress."

[14] As to the wide range of views of the state courts, see Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 363-368 (1962).

as mere moral obligations, not legally enforceable in the courts.[14] Such a result would be absurd:

> "The substantive law applied * * * should be the same regardless who is the nominal plaintiff. The test of the validity of the provision, the rules of interpretation, and the considerations brought to bear in resolving ambiguities ought not be different because the individual rather than the union brings the suit."[15]

(2) Federal doctrine would nevertheless impinge, however, even as to rights personal to employees, if the case involved issues arguably subject to the jurisdiction of the NLRB, for in that event the preemption doctrine of *Garmon* would come into play. A substantial percentage of cases would, as shown in our main Brief, p. 25 *ff.*, present preemption issues.

(3) The court would have to decide in each case whether the right asserted runs to the employee or to the union. As Justice Frankfurter pointed out in *Westinghouse* (348 U.S. at 456–458), these determinations involve considerable difficulty. The state courts are not even in agreement on whether an individual employee may sue for discharge in alleged violation of a collective bargaining agreement.[16] Under respondent's theory each state court determination as to whether a right under a collective agreement runs to the union or to the employees individually would presumably present a federal question subject to review by this Court.

(4) Respondent does not discuss the problem of suits on rights having what Professor Cox calls a "double aspect,"

[14] See *Young* v. *Canadian Northern Ry. Co.*, [1931] A.C. 83; Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955).

[15] Summers, *op. cit. supra* at 373.

[16] See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 646-647 (1956); Summers, *op. cit. supra*, at 372.

that is rights running both to the union as an entity and to the employees personally. (The contract clause here sued on is a prime example. Professor Cox suggests provisions giving top seniority to union officials as another.[7]) A suit by a union to enforce such a right would, however, be within the jurisdictional reach of § 301 (a), and hence would seem to be controlled by substantive federal law, even according to respondent. Whether respondent asserts that a suit on such a right by individual employees would be controlled by state substantive law, we do not know. If so, the forum shopping which existed under *Swift* v. *Tyson*, 16 Pet. 1, would be revived.[8]

(5) As far as we can make out, respondent does not commit itself as to whether federal or state law controls as to claims against employees personally. (We have argued, *supra* pp. 10-11, that *Atkinson* v. *Sinclair Refining Co.* holds that federal law controls, and that this holding rejects petitioner's contention.) However, if respondent's contention were accepted it would logically follow that state law would control. Hence the problems and difficulties heretofore and hereafter mentioned would arise equally in the case of claims against employees personally.

(6) Respondent concedes that federal substantive law controls in suits with respect to agreements to arbitrate or

[7] Cox, *op. cit. supra*, p. 617, n. 21.

[8] *Board Bar* suggests a related problem. As stated *supra* p. 6, at the outset that suit involved both what respondent would presumably characterize as a claim enforceable by the union as an entity, i.e., the claim that the contract as a whole was legally binding, and what respondent would characterize as claims enforceable by the employees individually, i.e., for the wage increases provided for by the contract. By the time the final decree was entered, however, the first aspect of the case had become moot, and the decree simply awarded money damages in specific amounts to named individuals. According to respondent's theory, presumably the case started out controlled by federal law, and ended up controlled by state law.

arbitration awards, because such suits could be brought by a union under § 301(a). (Br. pp. 8, 48.) Thus, according to respondent, if enforcement of an employee's wage claim is sought via arbitration federal substantive law controls (and NLRB jurisdiction need not be deferred to), while if enforcement is sought via a state court suit or a federal diversity suit, state substantive law controls (and NLRB jurisdiction must be deferred to.)

Thus for numerous practical as well as theoretical reasons we submit that federal substantive common law must (absent federal statutory law) control as to all issues with respect to collective bargaining in both federal and state courts. These issues must perforce include not only those involving interpretation or enforcement of collective bargaining agreements, but such questions as the duty of the union fairly to represent all employees in the unit, the power of the union to settle a dispute with the employer without the acquiesence of the employee, whether employees have individual contractual rights which they may enforce independently of or in opposition to the union, etc., etc. We see no room for the intrusion of state substantive law on any of these issues, save as a source of federal law.

As respects procedural matters, we take it that federal law controls in the federal courts and state law in the state courts. More precisely, state law prevails in the state courts on procedural matters, except as it may be overridden by controlling federal substantive law.

For example, state law must of necessity still control in the state courts as to whether a union may sue or be sued as an entity in the name of the union, or in a class suit as in *Dowd Box*. While § 301 (b) provides that a union may sue or be sued as an entity in the federal courts, Congress has not undertaken, if it could, to lay down such a rule for the state courts.

Accordingly state law controls on whether individual employees (or, as here, their assignee) may sue in the state courts to enforce rights under a collective bargaining agreement, insofar as the question is, as here, merely procedural. Conceivably the respondent might have urged a number of substantive defenses which would have cut across this procedural question, but it did not. For example, respondent might have urged that the rights sued on ran exclusively to the union and not to the individual employees, so that suit must be brought in the name of the union as the real party in interest.[1] Had respondent raised such a defense it would have, we think, presented an issue of federal substantive law.[2] Actually respondent takes just the opposite position, *viz.*, that the rights sued on run only to the employees, and are enforceable only by them.

[1] There is wide disagreement among commentators and courts on whether only the union has standing to sue on a collective bargaining agreement, or whether employees may also sue, and, if so, in what circumstances and on what grounds. See, *e.g.*, Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962); Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 Cornell L. Q. 25 (1959); Howlett, *Contract Rights of the Individual Employee as Against the Employer*, 8 Lab. L. J. 316 (1957); Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 Lab. L. J. 850 (1957).

[2] Professor Summers concludes that the issue is one of federal law. See *op. cit. supra* at 370-375. The lower courts have in general ignored the question whether state or federal law controls, with the result that both state and federal courts have usually assumed that state law controls. See Summers, pp. 370-371. Most of these decisions of course antedate *Lincoln Mills*. However in *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir.), *affirmed on another ground*, 370 U.S. 530, the Court of Appeals treated state law as controlling both as to the standing of the individual employees to sue and as to the interpretation of the contract. Judge Lumbard dissenting, pointed out that federal substantive law should control. 288 F. 2d 105. Contra, and treating the substantive issue as one of federal law, see *Giordano v. Mack Trucks*, 203 F. Supp. 905 (N.J. 1962).

Respondent must, however, recognize that the issue whether the rights are enforceable by the union, by the employees, or by both, is one of federal law, since respondent rests its position (though erroneously, as we think) on the *Westinghouse* case.

Again, respondent might have urged (assuming the facts to support such a defense) that the union and respondent had entered into a binding settlement of the claims sued on;[22] or that the suit should be stayed pending arbitration, or dismissed because of the union's failure to take the case to arbitration,[23] or because the union had refused to arbitrate. The sufficiency of any of these substantive defenses would, we submit, have been controlled by federal law. See, *e.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Giordano* v. *Mack Trucks*, 203 F. Supp. 905 (N.J. 1962). That is the conclusion reached by Professor Summers, after exhaustive review of the subject. He states (*op. cit. supra* n. 20, at 374):

> "The rights of individuals, both their right to standing and their substantive rights, must be governed by federal substantive law.
>
> "This result, which requires a comprehensive and exclusive body of federal law governing all relationships within the collective agreement, is a nearly inevitable consequence of the Court's decision in *Lincoln Mills*. The collective agreement creates a complex of relationships between the employer, the union, and the employee. It is designed to benefit and govern all of the parties as a functioning institution. A coherent and appropriate body of law can not be fashioned by pulling threads from the fabric and treating them with multicolored state law."

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[22] Rejecting such a defense, see *Pattenge* v. *Wagner Iron Works*, 275 Wisc. 495, 82 N.W. 2d 172 (1957).

[23] Sustaining such a defense, see *Parker* v. *Borock*, 5 N.Y. 2d 156, 156 N.E. 2d 297, 182 N.Y.S. 2d 577 (1959).

CONCLUSION

Respondent argues that cases of this sort are controlled by state substantive law, unreviewable by this Court; and that when, as here, the case involves an issue within the jurisdiction of the NLRB, the preemption doctrine of *Garmon* must be applied to forestall possible "diversities and conflicts."

We would agree that *Garmon* should be applied if we agreed that state substantive law controls, but we do not. For the reasons set forth above, we submit that federal, and not state, substantive law is applicable, and that there is, therefore, no basis for differentiating the present case from *Dowd Box* and *Lucas Flour*, in which it was held that the preemption doctrine of *Garmon* is not applicable to suits for the violation of collective bargaining agreements.

For the reasons stated, it is respectfully urged that the judgment of the court below should be reversed.

Respectfully submitted,

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CITATIONS

Miscellaneous:

In the Supreme Court of the United States

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No. 13

DOYLE SMITH, PETITIONER

v.

EVENING NEWS ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This reply brief is directed to respondent's contention that, since this suit was brought by individual employees rather than by the union, it falls outside the purview of Section 301 of the Labor-Management Relations Act; that the State court would therefore be free to apply State law; and that one of the major considerations for finding the *Garmon* preemption principles inapplicable here—that the case would in any event be decided in accordance with federal law—is not in fact present. This contention was anticipated, but not fully treated, in the government's opening brief (p. 11, n. 9), for the decision of the court below did not raise the Section 301 issue.

1. Respondent's contention rests on the premise (Br. 14–15) that a claim for wages lost as a result of breach of the no-discrimination clause of a collective bargaining agreement is a "uniquely personal right" of the employee which only he can vindicate, and therefore, under *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, cannot be considered a suit within the purview of Section 301(a) of the Labor-Management Relations Act. We submit that respondent's premise is erroneous.

In *Westinghouse*, the union brought suit on behalf of its members, in a federal district court, to recover wages allegedly due them under the collective bargaining agreement.[1] A majority of the Court (Chief Justice Warren and Justices Frankfurter, Burton, Minton and Clark), held that the suit sought to enforce rights under the contract which were "uniquely personal" to the employees, and that Section 301(a) did not confer on the federal district courts jurisdiction over such suits.[2] The majority of the Court was impelled to this view by a desire to avoid the constitutional question which would be presented if it were held that Section 301 vested the federal courts with jurisdiction over contract actions without at the same time empowering them to apply federal law. This problem was resolved in *Textile*

[1] The company deducted wages for absences on April 3, despite a provision in the contract that full salary should be paid regardless of absences in that month.

[2] However, the case does not hold that the union could not enforce these "personal" rights. See Cox, *Rights under a labor agreement*, 69 Harv. L. Rev. 601, 603 (1956).

Workers Union v. *Lincoln Mills*, 353 U.S. 448, when the Court held that Section 301 not only granted the federal courts jurisdiction, but also empowered them to fashion a body of federal law for collective bargaining agreements in industries affecting commerce.

Since *Lincoln Mills*, the distinction between contract rights which are "uniquely personal" to the employee and those which are not has either disappeared, or the former category has not been extended beyond the precise situation presented in *Westinghouse, i.e.*, a suit to collect wages due the employees under the contract. Thus, in *Lincoln Mills* itself, the union was permitted to compel arbitration of an employee claim for back pay, and in the companion case of *General Electric Co.* v. *Local 205, UEW*, 353 U.S. 547, it was permitted to compel arbitration of an employee claim of wrongful discharge. In *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, the Court held that the union could obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to an employee who was wrongfully discharged. Most important, in *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, the union was permitted to obtain a money judgment equivalent to the amount of back wages which the employees would have earned had the employer complied with the contract. All of these actions were brought in federal courts under Section 301.

2. If Section 301 and federal substantive law would thus be applicable had the union brought the suit, respondent's position reduces itself to the contention that, merely because the suit is brought by the in-

dividual employees, a different result obtains, *i.e.*, State substantive law governs. This conclusion rests upon two premises: first, that Section 301 does not give the federal courts jurisdiction over suits brought by individual employees; and, second, that the mandate to develop a body of pre-emptive federal substantive law should not be deemed to extend to any suit which the particular plaintiff could not have brought in a federal district court. The second of these premises, as we shall show, is wholly unacceptable, for it would entail the intolerable consequence that different rules of substantive law would be applicable to the same cause of action and the same legal issues, depending upon the identity of the plaintiff. We would add, moreover, that the first premise—*i.e.*, the inability of individual employees to sue under collective bargaining agreement in federal courts—is at best dubious.

(*a*) Section 301(a) of the Labor-Management Relations Act provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Although this section speaks only of suits "in any district court of the United States," this Court held in *Dowd Box, supra,* and *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, that suits by a union within the

purview of that section, *i.e.*, based on a collective bargaining contract in an industry affecting commerce, could also be brought in a State court and would there be subject to federal substantive law. Thus, Section 301 accomplishes two things: (a) it creates a non-exclusive federal forum for suits on collective bargaining agreements in an industry affecting commerce; and (b) it provides that such suits shall be governed by federal substantive law, whether brought in State or federal courts.

Even if it be held that the first aspect of Section 301(a)—the jurisdictional grant—extends only to suits on collective bargaining agreements by employers and unions, it does not follow that such suits, if brought by individual employees in a State court, are not within the substantive-law purview of Section 301(a).[3] It borders on the absurd, we believe, to suggest that the same cause of action involving the same facts and the same legal issues should be decided in accordance with different substantive-law rules, depending upon whether it is brought by an

[3] Where Congress permits federal rights to be enforced in a State court as well as a federal court, the general principle is that the State may apply its own particular rules of procedure so long as those rules do not detract from or impair the federal right which has been created. See *Central Vermont Ry. Co.* v. *White*, 238 U.S. 507, and *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (State court enforcement of the Federal Employers Liability Act). Cf. *Cates* v. *Allen*, 149 U.S. 451 (case removed to federal court on diversity grounds should be remanded to State court, rather than dismissed, where State equity rules would permit relief which federal rules deny). A State court rule permitting individual employees to sue on a claim, which only the union could sue on in a federal district court, would appear to be a permissible "procedural" variation which does not impair the substantive right

employee or his representative, *i.e.*, the union.[4] The wages due, the order of layoff under the seniority clause and the grounds for discharge cannot vary merely because the plaintiff is the individual employee rather than the union. To permit such variation would create uncertainty, destroy uniformity and "exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements." *Local 174, Teamsters* v. *Lucas Flour Co., supra,* at 103.

Indeed, the same chaotic consequences would result from the application of State law even in suits brought by individual employees to enforce a "uniquely personal" right, and even on the assumption that the union would not have been able to sue on behalf of its members. For while a purely personal grievance may furnish the occasion for a suit, the outcome

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created by Section 301. The rule concerns "the manner and the means by which a right to recover * * * is enforced," and does not "significantly affect the result of a litigation." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. Moreover, to permit individual employees to sue is consonant with the broad purpose of Section 301, *i.e.*, to require the parties to abide by the terms of their agreements. Cf. *McCarroll* v. *Los Angeles County District Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322, 328, certiorari denied, 355 U.S. 932 (holding that the foregoing considerations permitted a State court to enjoin strikes in breach of the collective agreement, even though the Norris-La Guardia Act would have barred a federal court, had the suit been brought there, from granting the same relief).

[4] For a general discussion of this problem, see Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 370–375 (1962); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1551–1552, n. 69 (1962); Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1339 (1954).

may turn upon issues of quite general significance. To cite only one example, the question whether a strike in breach of contract constitutes a repudiation of the agreement which releases the employer from his undertakings may arise in connection either with an action by an individual employee to recover unpaid wages, or in an action by the union to compel arbitration. It would be highly undesirable to permit that question to be governed by different legal standards, depending upon whether it arose in the one context or the other.

(*b*) If it be assumed that the jurisdictional grant of Section 301(a) does not authorize individual employees to enforce federal rights under a collective bargaining agreement in a federal court, it may be thought incongrous to permit them to enforce such federal rights in a State court. However, as between that anomaly and the massively disruptive incongruity of allowing the same legal issues to be governed by varying rules of decision, the former seems infinitely preferable. Furthermore, the proposition that individual employees cannot enforce rights under a collective bargaining agreement in federal courts is by no means clear. While several lower courts have interpreted Section 301(a) as authorizing suits only by the employer or the union,[5] we submit that its words do not necessitate this conclusion. It is equally consistent with the words to read the phrase "between an employer and a labor organization" as merely

[5] *e.g.*, *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997 (C.A. 7); *Copra* v. *Suro*, 236 F. 2d 107 (C.A. 1); *Palnau* v. *Detroit Edison Co.*, 301 F. 2d 702 (C.A. 6).

describing the kind of contract on which suit may be brought, and not the kind of suits. Nor is this reading inconsistent with the legislative history of Section 301(a), for, though the dominant intention was to provide a forum for contract suits by or against labor organizations, there is some indication that employee suits were also contemplated.[6] Moreover, the foregoing analysis appears to be supported by the holding in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, that Count II of the complaint there was within the purview of Section 301(a) notwithstanding that it was directed against individual members of the union and federal jurisdiction was claimed on diversity grounds (*id.*, at 245–249).

To read the phrase "between an employer and a labor organization * * *" as modifying the adjoining noun "contracts" and not the earlier noun "suits" would produce harmony not only between the governing substantive law and the forum in which individual employees may sue but also within the statutes defining the jurisdiction of the federal courts. As we have said above there are compelling reasons for holding that the law governing all actions upon a single collective bargaining agreement must be the same, *i.e.*, federal, regardless of where the suit is brought. It follows that an action by an individual employee upon a collective bargaining agreement would be an action arising under the laws of the United States. *Textile*

[6] See the statements of Representative Barden and Senator Taft set out in the Appendix to Mr. Justice Frankfurter's dissenting opinion in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 521, 538.

Workers Union v. *Lincoln Mills,* 353 U.S. 448. A district court would therefore have jurisdiction without regard to the amount in controversy under 28 U.S.C. 1337 which grants such jurisdiction over civil actions under statutes regulating commerce. Cf. 28 U.S.C. 1331(a), which would also give jurisdiction where the amount in controversy exceeded $10,000. Nothing in Section 301(a) indicates an affirmative intention to curtail the jurisdiction granted by these statutes once it is concluded for independent reasons, as we think it must be, that federal law governs all actions under collective bargaining agreements, wherever brought, it being intolerable to have the three-way relationship between employer, employees and labor union under a single contract governed by two different sets of laws. Reading Section 301(a) to permit individual "[s]uits for violation of contracts between an employer and a labor organization * * *" would bring harmony into this entire body of law.

In sum, therefore, the instant suit falls within the purview of Section 301 and federal substantive law would govern, notwithstanding that it was brought by individual employees rather than by the union on their behalf. Accordingly, the fact that individual employees brought the suit does not impair the considerations advanced in our opening brief for concluding that the *Garmon* preemption principles were inapplicable here and did not bar the exercise of State court jurisdiction.

For these reasons, as well as those set forth in our opening brief, the judgment of the court below should be reversed.

Respectfully submitted.

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